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2601  
**No. 12363**

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

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**YOUNG BROTHERS, LIMITED, Claimant of**  
**the Tug "Kolo" her boats, engines, machinery,**  
**tackle, etc.,**

**Appellant,**

**vs.**

**JOHN CHO,**

**Appellee.**

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**Apostles on Appeal**

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**Appeal from the United States District Court,**  
**Territory of Hawaii.**

**FILED**

**DEC 9 1949**

**PAUL P. O'BRIEN,**  
**CLERK**



**No. 12363**

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**Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

ROBERTSON, CASTLE and ANTHONY,  
By WILLIAM F. QUINN,

for the Libellant, John Cho.

312 Castle & Cooke Building,

Honolulu, T. H.

SMITH, WILD, BEEBE & CADES,  
By J. EDWARD COLLINS,

for the Respondent, The Tug "Kolo" etc.

Bishop Trust Building,

Honolulu, T. H.

## LIBEL

In the United States District Court for the  
Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

The tug, "KOLO," her boats, engines, machinery,  
tackle, etc.,

Respondent.

Libel

To the Honorable J. Frank McLaughlin, Judge of  
the District Court of the United States within  
and for the District of Hawaii:

John Cho, an individual residing in Honolulu, City and County of Honolulu, in said District, owner of the sampan Tenyo Maru at the time of the events and happenings hereinafter set forth, exhibits this his libel against the motor driven tug Kolo, her boats, engines, machinery, tackle, apparel and furniture in a cause of negligent towage, civil and maritime, and thereupon alleges as follows:

## First

The Libellant at the time of the events and happenings hereinafter set forth was the owner of the Tenyo Maru, an oil-screw wooden sampan of approximately nine net tons, register length 48.1 feet, breadth 10.7 feet, and depth 5 feet.

## Second

The Kolo is a motor driven tug, official number

251620, with steel hull and 210 horsepower diesel engine, of 42.73 gross tonnage, 60.6 feet in length, 16.3 feet in breadth, and 6.2 feet in depth, owned by Young Brothers, Limited, a Hawaiian corporation having a usual place of business in Honolulu aforesaid.

### Third

On Saturday, April 3, 1948, the aforesaid Tenyo Maru went aground on a reef off the island of Molokai. Libellant was unable to engage a tug to salvage the Tenyo Maru until Tuesday, April 6, 1948. On the latter date the aforesaid tug Kolo, and the tug Mahoi, also owned by Young Brothers, Limited, towed the Tenyo Maru off the reef and into the harbor at Kaunakakai, Molokai. While on the reef, the Tenyo Maru developed a leak, requiring that her pumps be manned.

### Fourth

During the night of April 6, the Tenyo Maru remained at the pier at Kaunakakai. The vessel was taking water through a rip in her bottom. The rip could not be patched from the inside of the vessel because it was situated underneath the fuel tank, nor could repairs be made from the outside of the hull because there were no facilities at Kaunakakai to lift the vessel out of the water. A pump was manned aboard the vessel during the night and this sufficed to keep the inside dry. The captain of the Kolo came aboard the Tenyo Maru to advise and assist Libellant with respect to the condition of the damaged vessel.

## Fifth

At about noon on Wednesday, April 7, the afore-said tug Kolo, disregarding the known unseaworthiness of the vessel, took the Tenyo Maru in tow. The damaged sampan retained a crew of three aboard to man the pump to keep up with the leakage. When the tug and tow proceeded into the channel between Molokai and Oahu, the damaged sampan began to take water at a rate far in excess of the capacity of the pumps. The crewmen aboard the sampan advised the captain of the Kolo of this fact, whereupon the Kolo increased its speed. About one half hour later, at approximately 3:30 P.M. o'clock, the decks of the sampan were awash. The Kolo cut the tow lines and proceeded back to pick up the crew of the sampan.

## Sixth

The damage suffered by the Libellant through the loss of said vessel is about Twelve Thousand Dollars (\$12,000.00).

## Seventh

The said loss was caused through no fault of the Libellant, but solely through the fault of those in charge of said motor-driven tug Kolo, as follows:

(1) In taking a vessel under tow which they knew or should have known was unseaworthy;

(2) In towing a leaking vessel through the rough waters of the Molokai channel;

(3) In failing to take proper action when advised that the vessel was taking more water than she could pump;

(4) In other faults to be shown at the trial of the action.



## Eighth

Said tug is, or shortly will be, in the port of Honolulu and within the admiralty and maritime jurisdiction of this Honorable Court.

## Ninth

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, Libellant Prays that process in due form of law may issue against the tug Kolo, her boats, engines, boilers, machinery, tackle, apparel and furniture, and against any and all persons having or claiming to have any interest therein, citing them to appear and answer all and singular the matters aforesaid, and that this Honorable Court will pronounce for the Libellant's damages and decree that the same may be paid, together with his costs and for such other and further relief as to right and justice may appertain, and as this Honorable Court is competent to give in the premises, and further, that the claimant may be ordered to answer under oath the interrogatories hereto subjoined.

Dated: Honolulu, T. H., September 30th, 1948.

/s/ JOHN CHO.

ROBERTSON, CASTLE &  
ANTHONY,

Proctors.

Territory of Hawaii,  
City and County of Honolulu—ss:

John Cho, being first duly sworn, upon oath deposes and says that he is the Libellant named in the

foregoing libel; that he has read the said libel, knows the contents thereof, and that the same is true.

/s/ JOHN CHO.

Subscribed and sworn to before me this 30th day of September, 1948.

[Seal] /s/ CHARLES Y. AWANA.

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

---

[Title of District Court and Cause.]

INTERROGATORIES REFERRED TO IN THE  
FOREGOING LIBEL TO BE ANSWERED  
BY THE CLAIMANT UNDER OATH

1. On April 6, 1948, who was the owner of the tug Kolo?
2. On said date who operated said tug?
3. At what hour on April 7, 1948, did said tug take the sampan Tenyo Maru under tow?
4. Did the person operating said tug know that the aforesaid sampan had a rip in her bottom at the time she was taken in tow?
5. What was the prevailing wind on that day?
6. At what hour did said tug and said sampan enter the Molokai channel?
7. What was the size of the waves in said channel?
8. What was the velocity of the wind in said channel?

9. At what speed was the said tug proceeding when she entered said channel?

10. What changes of speed did said tug make after she took the sampan in tow, and at what hours were said changes made?

11. At what hour did the person operating said tug learn that said sampan was taking water badly?

12. What action did said person take upon learning of the sampan's difficulty as aforesaid?

13. At the time of the aforesaid difficulty, how far was said tug from Laau Point?

14. At what hour did the captain of the Kolo order that the tow line be cut?

15. What was the approximate location where the said sampan was cut loose?

16. Please annex hereto original deck log and engineer's log of said tug Kolo covering the voyage from the time when the tow left Kaunakakai to the time said tug arrived in Honolulu after having lost her tow.

/s/ ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN.

[Endorsed]: Filed Oct. 12, 1948.

---

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America to  
the Marshal of the United States of America  
for the Territory of Hawaii—Greeting:

Whereas, a libel has been filed in the District

Court of the United States for the Territory of Hawaii on the 12th day of October, 1948, by John Cho, a resident of Hawaii, Libellant, against the motor driven tug Kolo, in a cause, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her boilers, engines, tackle, apparel, cargo and furniture, may be cited in general and special, to answer the premises, and all proceedings being had against said vessel, her boilers, engines, tackle, apparel, cargo and furniture, may for the causes in the said libel mentioned be condemned and sold to pay the demands of Libellant.

You Are Therefore Hereby Commanded to attach the said vessel, her boilers, engines, tackle, apparel, cargo and furniture and to retain the same in your custody until further order of the Court regarding the same and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of said libel; that they be and appear before the said Court to be held in and for the Territory on the 22d day of October, 1948, at 10 o'clock, A.M. of said day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises you do then and there make return thereof, together with this writ.

Witness, the Honorable J. Frank McLaughlin, Judge of said Court at the City of Honolulu, in the Territory of Hawaii, this 12th day of October, 1948, and of our Independence the one hundred seventy-third.

[Seal]      /s/ WM. F. THOMPSON, JR.,  
Clerk.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN,  
Proctors for Libellant.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

#### STIPULATION FOR LIBELLANT'S COSTS

Stipulation for Libellant's costs, entered into pursuant to the rules and practices of this Court.

Whereas, a libel will be filed in this Court on or about October 12, 1948, by John Cho, Libellant, a resident of Hawaii, against the motor-driven tug Kolo in a cause civil and maritime, for the causes in the said libel mentioned; and praying that process may issue against said tug Kolo, her boats, engines, machinery, tackle, apparel and furniture, and the said Libellant and Herbert K. North, stipulator, parties hereto, hereby consenting and agreeing that in case costs are awarded against the said Libellant or said stipulator, the decree therefor not exceeding the sum of Two Hundred Fifty and 00/100 Dollars (\$250.00) may be entered against them and each

of them, and thereupon execution may issue against their and each of their goods, chattels, lands, tenements and other real estate; Now Therefore,

It Is Hereby Stipulated and Agreed, for the benefit of whom it may concern, that the Libellant herein, John Cho, residing at 3638 Leahi Avenue, in the city of Honolulu, and by occupation a fish merchant, and stipulator Herbert K. North, residing at 2314 S. Beretania Street, in the city of Honolulu, and by occupation a boat charterer, shall be and each of them is hereby bound in the sum of Two Hundred Fifty and 00/100 Dollars (\$250.00), conditioned that they shall pay all costs and expenses which shall be awarded against said Libellant and/or the stipulator undersigned or any one of them by decree of this Court and in case of appeal by any appellate court.

Dated: Honolulu, T. H., October 6, 1948.

/s/ JOHN CHO,  
Libellant.

/s/ HERBERT K. NORTH,  
Stipulator.

Taken and acknowledged before me this 6th day of October, 1948. .

[Seal] /s/ CHARLES Y. AWANA.  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.

Territory of Hawaii,  
City and County of Honolulu—ss:

John Cho and Herbert K. North, being duly sworn, each deposes and says that he is worth the sum of Five Hundred Dollars (\$500.00) over and above all his debts and liabilities.

/s/ JOHN CHO,

/s/ HERBERT K. NORTH.

Subscribed and sworn to before me this 6th day of October, 1948.

[Seal] /s/ CHARLES Y. AWANA.

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

CLAIM OF OWNER

And Now Appears Young Brothers, Limited, a Hawaiian corporation, intervening for itself as owner of the tug "Kolo," her boats, engines, machinery, tackle, etc., before this Honorable Court, and makes claim to the said the tug "Kolo," her boats, engines, machinery, tackle, etc., as the same are or may be attached by the Marshal under process of this Court, at the instance of John Cho, and

the said Claimant, Young Brothers, Limited, a Hawaiian corporation, avers that it was at the time of the filing of the libel herein and still is the true and bona fide sole owner of the said the tug "Kolo," her boats, engines, machinery, tackle, etc., and that no other person is the owner thereof; wherefore it prays to defend accordingly.

Dated: Honolulu, T. H., October 11th, 1948.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.  
Claimant.

SMITH, WILD, BEEBE &  
CADES,  
Proctors for Claimant.

Territory of Hawaii,  
City and County of Honolulu—ss:

E. T. Harrison, being duly sworn, deposes and says:

That he is the Vice-President of Young Brothers, Limited, a Hawaiian corporation, the Corporation described in and which executed the foregoing Claim; that he has read the said Claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that he knew the seal of the said corporation; that the seal affixed to the said Claim was such corporate seal; that it was so affixed by authority of the Board



of Directors of said corporation, and that he signed his name thereto by like authority.

/s/ E. T. HARRISON.

Subscribed and sworn to before me this 11th day of October, 1948.

[Seal] /s/ CHAS. AKANA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

---

[Title of District Court and Cause.]

### RELEASE BOND

Whereas, a libel was filed in this Court on the 12th day of October, A. D. 1948, by John Cho, libelant, against the tug "Kolo," her boats, engines, machinery, tackle, etc., respondent, for the reasons and causes in said libel mentioned and claim to the tug "Kolo," her boats, engines, machinery, tackle, etc., has been filed by Young Brothers, Limited, a Hawaiian corporation; and the said claimant hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, execution may issue against its goods, chattels and lands for the sum of Fifteen Thousand and no/100ths Dollars (\$15,000.00),

Now, Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulator undersigned shall be and is hereby bound in the sum of \$15,000.00, conditioned that if Young Brothers, Limited, a Hawaiian corporation, claim-

ant above named, shall abide by all orders, interlocutory or final, of this Court, and pay all money awarded by final decree rendered in this cause, together with interest and costs, or in case of appeal, by any appellate court, then this stipulation is to be void; but otherwise shall remain in full force and effect.

Dated: Honolulu, T. H., October 12, 1948.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.

By /s/ J. B. GUARD, SR.,  
Treasurer.

It Is Hereby Agreed that the foregoing bond is sufficient in form, substance and amount and that no stipulation for costs need be filed by the claimant in the above entitled action.

Dated: Honolulu, T. H., October 12, 1948.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN,  
Proctors for Libellant.

[Endorsed]: Filed Oct. 12, 1948.

---

[Title of District Court and Cause.]

ANSWER

To the Honorable, the Judges of the District Court  
of the United States in and for the District of  
Hawaii:

The answer of Young Brothers, Limited, a Hawaiian corporation, owner and claimant of the tug Kolo, to the libel of John Cho, owner of the sampan Tenyo Maru, against the tug Kolo in a cause of negligent towage, civil and maritime, alleges as follows:

#### First

That it has no information or belief sufficient to enable it to answer the allegations of the article numbered "First" of the libel herein and therefore calls for strict proof thereof, if relevant.

#### Second

That it admits the allegations of the article numbered "Second" of the libel herein.

#### Third

Answering the allegations of the article numbered "Third" of the libel herein, that it admits that on Tuesday, April 6, 1948, the tug Kolo and the tug Mahoe towed the Tenyo Maru off a reef lying off the Island of Molokai and that the tug Kolo did tow the Tenyo Maru into the harbor at Kaunakakai, Molokai; that it admits that the Tenyo Maru developed a leak and said leak required that pumps be manned while at the harbor of Kaunakakai, Molokai; and that it alleges that it has no information or belief sufficient to enable it to answer the balance of the allegations contained in this article of the libel herein and therefore calls for strict proof thereof, if relevant.

## Fourth

Answering the allegations of article numbered "Fourth" of the libel herein, that it admits that during the night of April 6th the Tenyo Maru remained at the pier at Kaunakakai taking water and that at some time during the night a pump was manned aboard the vessel. That it further admits that the captain of the Kolo went aboard the Tenyo Maru while at the pier at Kaunakakai to observe her condition. That it alleges that it has no information or belief sufficient to enable it to answer the further allegations of this article of the libel and therefore calls for strict proof thereof, if relevant.

## Fifth

Answering the allegations of the article numbered "Fifth" of the libel herein, that it admits that on or about noon on Wednesday, April 7, the tug Kolo took the Tenyo Maru in tow. That it admits that the sampan Tenyo Maru retained a crew of three aboard. That it admits that when the tug and the tow were in the channel between Molokai and Oahu, it was observed that the sampan was low in the water and on or about 4:00 o'clock P.M. the decks of the sampan were awash and thereupon the Kolo cut the tow lines and proceeded back to pick up the crew of the sampan. That it alleges that it has no information or belief sufficient to enable it to answer the further allegations of this article of the libel and therefore calls for strict proof thereof, if relevant.

## Sixth

That it alleges that it has no information or belief

sufficient to enable it to answer the allegations set forth in the article numbered "Sixth" of the said libel and therefore calls for strict proof thereof, save and except that it admits that libelant has demanded payment of the sum of \$12,000.00 from the respondent and alleges that respondent has paid neither the whole nor any part thereof to the libelant.

#### Seventh

That it denies the allegations set out in the article numbered "Seventh" of the libel and that the alleged loss was due to any carelessness and/or negligence and/or fault of the respondent and/or its agents and/or employees.

#### Eighth

That it admits that the tug Kolo is within the admiralty and maritime jurisdiction of this Honorable Court.

#### Ninth

That it denies that all and singular, or all or singular, the premises are true (except as heretofore specifically admitted) but admits that if true they are within the admiralty and maritime jurisdiction of this Honorable Court.

#### Tenth

And further answering said libel and as a separate defense, the claimant alleges that on or about noon, on Wednesday, April 7, 1948, the owner of the sampan Tenyo Maru, despite his, said owner's, knowledge that the master of the tug Kolo was without authority to undertake a tow without obtaining

prior permission from the proper officers of the claimant, prevailed upon the master of said tug, who had like knowledge, to take said sampan into tow; that at the time said master undertook said tow under the circumstances aforesaid he was acting gratuitously and as the servant of the owner of said sampan and wrongfully using said claimant's tug in the aforesaid service.

### Eleventh

And further answering said libel and as a separate defense, the claimant alleges that the libelant, owner of the sampan Tenyo Maru did, on prevailing upon said master of the tug Kolo to undertake the tow to the port of Honolulu as aforesaid, furnish for towage a vessel unseaworthy in the following respects; to-wit: that said vessel had been and was taking water in large quantities through ruptures in her skin; the pump aboard the said vessel was inadequate in quality and capacity to keep her free of sea water in the then condition of her hull; her crew was composed of incompetent, careless and inattentive persons; she was placed in charge of an incompetent person by the libelant; and that said unseaworthy condition in all particulars and details as set out aforesaid was well known to the libelant, owner thereof, at all times material hereto, and in particular at the time of prevailing upon the master of the Kolo to undertake the tow and at the time the sampan was turned over for towage, and that said unseaworthy condition was the sole cause of the loss of the sampan Tenyo Maru.

Wherefore, claimant demands that the libel herein be dismissed with costs.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.  
Claimant.

SMITH, WILD, BEEBE &  
CADES,  
Proctors for Claimant.

Territory of Hawaii,  
City and County of Honolulu—ss:

E. T. Harrison, being duly sworn, deposes and says:

That he is the Vice-President of Young Brothers, Limited, a Hawaiian corporation, the Corporation described in and making the foregoing Answers; that he has read the said Answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that he knew the seal of the said corporation; that the seal affixed to the said Answer was such corporate seal; that it was so affixed by authority of the Board of Directors of said corporation, and that he signed his name thereto by like authority.

/s/ E. T. HARRISON.

Subscribed and sworn to before me this 4th day of November, 1948.

[Seal] /s/ ROBERT T. TSUCHIYA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires Feb. 14, 1951.

[Endorsed]: Filed Nov. 5, 1948.

[Title of District Court and Cause.]

### ANSWERS TO INTERROGATORIES

Answers of Edward T. Harrison, manager of Young Brothers, Limited, claimant herein, to interrogatories propounded in this cause:

1. To the first interrogatory he says:

Young Brothers, Limited, a Hawaiian Corporation.

2. To interrogatory number 2 he says:

Young Brothers, Limited, owned said tug, and Joseph Kahiapo was the master, but at the time of the casualty referred to in the libel and at the time of taking said sampan into tow and thereafter, said Kahiapo was acting without authority from Young Brothers, Limited, or any of its officers, and against the direct order of the company.

3. To interrogatory number 3 he says:

According to the log of the tug Kolo, 12:15 P.M.

4. To interrogatory number 4 he says:

He understands that the aforesaid sampan was leaking and that the person operating said tug knew such fact, but that such person is not now in the employ of Young Brothers, Limited, and has not been in the employ of said Young Brothers, Limited, since the day after the occurrence.

5. To interrogatory number 5 he says:

On information and belief, it was a normal trade wind.

6. To interrogatory number 6 he says:

According to the log, one and a half hours after leaving Kaunakakai.



7. To interrogatory number 7 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

8. To interrogatory number 8 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

9. To interrogatory number 9 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

10. To interrogatory number 10 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

11. To interrogatory number 11 he says:

About 3:00 o'clock P.M.

12. To interrogatory number 12 he says:

According to the log, had to abandon tow one and a half hours away from Laau Point, picked up crew of sampan and proceeded to Honolulu.

13. To interrogatory number 13 he says:

From eight to ten miles.

14. To interrogatory number 14 he says:

Between 3:00 and 3:30 o'clock P.M.

15. To interrogatory number 15 he says:

According to the log, would judge about in the middle of Molokai Channel.

16. To interrogatory number 16 he says:

Do not keep engineering room log, but herewith copy of deck log.

/s/ EDWARD T. HARRISON.

Territory of Hawaii,  
City and County of Honolulu—ss.

Edward T. Harrison, being duly sworn, deposes and says:

That he is First Vice President and General Manager of Young Brothers, Limited, a Hawaiian corporation; that the foregoing answers to interrogatories subscribed by him are true to the best of his knowledge, information and belief.

/s/ EDWARD T. HARRISON.

Subscribed and sworn to before me this 4th day of November, 1948.

[Seal] /s/ ROBERT T. TSUCHIYA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires Feb. 14, 1951.

Receipt of copy acknowledged.

Young Brothers, Ltd.

KOLO

Honolulu, T. H., April 6, 1948

Leave	Work	Return
0700	Check and Warm Engine	
0720	YB #9 from Mahoe to Kolo	0840
0840	Stand by YB #9	1400
1400	Check Engine	

1415	YB #9 from Kolo to Mahoe	
	Return crew to Kolo	1510
1510	Proceed to Kaunakakai	
	Arrive Kaunakakai	1600
1615	Assist Tenyo Maru from Beach. Assist	
	Tenyo Maru to dock at Kaunakakai	
	wharf. Secure	1800

Launchman Kahiapo, Makua, Ballisto.

Certified Correct

/s/ E. T. HARRISON,  
General Manager.

Young Brothers, Ltd.

KOLO Honolulu, T. H., April 7, 1948

Leave	Work	Return
0730	Check and Warm Engine	
0800	Stand by Tenyo Maru	1100
1100	Prepare Tenyo Maru for tow	
1215	Proceed with Tenyo Maru under tow	
	to Honolulu—Pumps gave out 1 hour	
	away from Laau Pt. Tenyo Maru be-	
	gan sinking fast. Had to abandon tow	
	1½ Hour away from Laau Pt. Picked	
	up crew and proceeded to Honolulu . . .	
	Arrive Honolulu—Secure	2000

Launchman Kahiapo, Makua, Ballisto.

Certified Correct

/s/ E. T. HARRISON,  
General Manager.

[Endorsed]: Filed Nov. 5, 1948.

[Title of District Court and Cause.]

## BILL OF COSTS

Comes now John Cho, Libellant herein, and respectfully presents the following as his bill of costs:

Filing fee, U. S. District Court	\$15.00
Notarial fee to C. Y. Awana	1.25
Witness fees to U. S. Marshal	8.00
Service fees to U. S. Marshal	4.87
Proctors' docket fees, per 28 U.S.C.	
Section 1923	20.00
<hr/>	
Total	\$49.12

Attached hereto and marked Exhibit A is the affidavit of Thomas M. Waddoups in support of this bill of costs.

Dated: Honolulu, T. H., June 6, 1949.

ROBERTSON, CASTLE &  
ANTHONY

By /s/ THOMAS M. WADDOUPS,  
Proctors for John Cho,  
Libellant.

Approved:

/s/ J.F.Mc.

## EXHIBIT A

Affidavit of Thomas M. Waddoups  
Territory of Hawaii,  
City and County of Honolulu—ss.

Thomas M. Waddoups, being first duly sworn, on oath deposes and says that he is a member of the law firm of Robertson, Castle & Anthony, proctors for John Cho, Libellant above named; that the

items enumerated in the foregoing bill of costs, except the item provided for by statute, are all correct and were necessarily incurred in this case, and the services for which the statutory fee was charged were actually and necessarily performed.

/s/ THOMAS M. WADDOUPS.

Subscribed and sworn to before me this 6th day of June, 1949.

[Seal]     /s/ CHARLES Y. AWANA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed June 8, 1949.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having been heard on April 25 and 26, 1949, briefs having been filed on May 9, 1949, and counsel having been heard in oral argument on May 12, 1949, and proctor for respondent having moved to reopen for additional evidence on Tuesday, May 24, 1949, said motion having been granted and additional evidence having been adduced, the Court makes the following findings of fact and conclusions of law:

#### Findings of Fact

(1) The sampan *Tenyo Maru*, owned by John Cho, libellant herein, was aground on a reef off

Molokai, Territory of Hawaii, from April 3 to April 6, 1948.

(2) That on April 6, 1948, the said sampan was towed off the reef by the tugs, Kolo and Mahoe, owned by claimant, Young Brothers, Limited, a Hawaiian corporation.

(3) That on April 7, 1948, the lawful master of the tug, Kolo, Joseph Kahiapo, undertook to tow the sampan Tenyo Maru from Kaunakakai, Molokai, to Honolulu, Oahu.

(4) That at the time the said Tenyo Maru was taken in tow, its hull was damaged in an area 3-inches wide and about one and a half feet long and it was in an unseaworthy condition as a result of having been on the reef as hereinbefore stated and that the libellant, John Cho, and the master of the tug, Kolo, knew said sampan was unseaworthy.

(5) That when the tug, Kolo, and its tow were 8 to 10 miles from Molokai, in the Molokai Channel, the sampan had taken water to the extent that her decks were awash and she had 3 to 4 feet of free-board in the tow.

(6) That when the sampan was observed in such condition she was being towed astern of the tug by a hempen hawser.

(7) That Joseph Kahiapo was an inexperienced tug master having had no prior experience in open sea salvage towing and that due to said inexperience, Kahiapo immediately ordered the towline cut and returned to pick up the crew of the sampan although he was advised by Eberesto Abell, an

experienced crewman on the tug that said sampan would not sink and that the towline should not be cut.

(8) That the sampan being without cargo and having received a major overhaul of her hull in 1944, and having been placed in drydock for all necessary repairs at least once every five months since 1946 until the date of the occurrence here involved, had sufficient positive buoyancy to remain afloat and could in fact have been towed to Honolulu had she not been cut loose by the master of the Kolo.

(9) That when last seen the Tenyo Maru was still floating, decks awash, in the Molokai Channel.

#### Conclusions of Law

(1) That negligent towage is a maritime tort rendering the offending vessel liable in rem so long as said vessel is in the hands of a person having lawful possession of her.

(2) That both libellant and the master of the Kolo were negligent in taking a known unseaworthy craft in tow.

(3) That the master of the Kolo failed to exercise that degree of care and skill required of the master of a tug in open sea towage when he cut the Tenyo Maru adrift under circumstances where there was no necessity for so doing.

(4) That the aforesaid negligence of the master of the tug, Kolo, was the sole cause of the loss of the sampan, Tenyo Maru, and the respondent vessel is solely liable for full damage suffered by libellant

as the result of such negligence.

A decree embodying the above conclusions will be signed upon presentation.

Dated: Honolulu, Hawaii, June 3, 1949.

/s/ J. FRANK McLAUGHLIN,  
District Judge.

Approved as to form:

/s/ J. EDWARD COLLINS.

[Endorsed]: Filed June 8, 1949.

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In the United States District Court  
For the Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

The tug KOLO, her boats, engines, machinery,  
tackle, etc.,

Respondent.

### DECREE

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates for the respective parties and due deliberation having been had, It Is Now on motion of William F. Quinn, proctor for the libellant, Ordered, Adjudged and Decreed that the libellant recover of and from the respondent herein the sum of \$8,000.00 with interest thereon from April 7, 1948, at the rate of 6%, amounting to \$560.00 to-



gether with the libellant's costs taxed in the sum of \$49.12 and amounting in all to the sum of \$8,609.12 with interest thereon until paid, and that the libellant have execution therefor, and

It Is Further Ordered, Adjudged and Decreed, that unless this decree be satisfied or an appeal be taken within ten (10) days after service of a copy of this decree with notice of entry upon the claimant or its proctors, claimant and its stipulators for costs and value will perform the engagement of their stipulations or show cause within four days after the expiration of said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

Dated: Honolulu, Hawaii, June 3, 1949.

/s/ J. FRANK McLAUGHLIN,  
District Judge.

Approved as to form:

/s/ J. EDWARD COLLINS.

[Endorsed]: Filed June 8, 1949.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Sirs:

Please take notice that the claimant in the above-entitled cause, Young Brothers, Limited, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit from the final decree

of this Court entered herein the 8th day of June, 1949, and from each and every part of said decree. The claimant does not intend to make new pleadings or to take new proofs in this appeal.

Dated, Honolulu, T. H. June 18, 1949.

Yours respectfully,

SMITH, WILD, BEEBE &  
CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Claimant.

To:

WILLIAM F. QUINN,  
ROBERTSON, CASTLE & ANTHONY,  
Proctors for Libelant.

[Endorsed]: Filed June 18, 1949.

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[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

Dated at Honolulu, T. H. June 18, 1949.

[Endorsed]: Filed June 18, 1949.

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[Title of District Court and Cause.]

ORDER AUTHORIZING ACCEPTANCE OF  
CERTIFIED CHECK IN LIEU OF BOND

It Is Hereby Ordered, Adjudged and Decreed that the Clerk of the United States District Court for the Territory of Hawaii is authorized to accept

a certified check in the amount of \$250.00 from the claimant in the above-entitled action in lieu of an appeal bond as required by Rule 73(c) of the rules of procedure for the District Courts of the United States; said certified check to be surrendered by the Clerk of the United States District Court for the Territory of Hawaii upon the posting by the claimant herein of an appeal bond in that amount.

Dated: Honolulu, T. H. June 18, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

[Endorsed]: Filed June 20, 1949.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Young Brothers, Limited, a Hawaiian corporation, as principal, and The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, as surety, are held and firmly bound unto John Cho, libelant, in the sum of \$250.00 for the payment of which well and truly to be made, said Young Brothers, Limited, as principal, and The Aetna Casualty and Surety Company, as surety, do bind themselves, their respective successors and assigns, jointly and severally, and firmly by these presents.

The Condition Of This Obligation Is Such That:

Whereas the above bounden principal, Young

Brothers, Limited, has filed its notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above-entitled cause;

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if it fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

Dated: Honolulu, T. H. this 21st day of June, 1949.

YOUNG BROTHERS,  
LIMITED

By /s/ W. F. DILLINGHAM,  
Its President.

[Corporate Seal]

By /s/ J. B. GUARD,  
Its Secretary.  
Principal.

THE AETNA CASUALTY AND SURETY COM-  
PANY.

[Seal] By /s/ R. W. RONALD,  
Resident Vice-Pres.  
Surety.

Attest:

/s/ LAURA CARTER,  
Resident Asst. Sec.

Territory of Hawaii,  
City and County of Honolulu—ss.

On this 21st day of June, 1949, before me appeared W. F. Dillingham and J. B. Guard, to me

personally known, who, being by me duly sworn, did say that they are the President and Secretary, respectively, of Young Brothers, Limited, a Hawaiian corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said W. F. Dillingham and A. B. Guard acknowledged said instrument to be the free act and deed of said corporation.

[Seal]     /s/ CECILIA MARTIN SLATE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires Aug. 29, 1951.

[Endorsed]: Filed June 21, 1949.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING OF  
RECORD ON APPEAL AND DOCKETING  
OF APPEAL

Good cause appearing therefor,

It Is Hereby Ordered that the claimant-appellant herein shall have until August 31, 1949 for the filing and docketing of the appeal herein.

Dated: Honolulu, T. H., July 27, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Libellant Above Named:

To Robertson, Castle & Anthony, 312 Castle & Cooke Building, Honolulu, Hawaii, Proctors for Libellant:

To William F. Thompson, Jr., Clerk, United States District Court for the District of Hawaii:

Whereas the claimant herein, Young Brothers, Limited, has lately appealed to the United States District Court of Appeals for the Ninth Circuit from an entry of a judgment and decree in favor of the libellant and against the respondent, which judgment and decree was entered in the District Court of the United States of America for the District of Hawaii against the tug "Kolo", her boats, engines, machinery, tackle, etc., on June 8, 1949;

You are therefore hereby cited to appear before the United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, thirty days after the date of this citation to do and receive what may appertain to justice to be done in the premises.

Given unto my hand in Honolulu, City and County of Honolulu, Territory of Hawaii, on the 25th day of August, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

[Title of District Court and Cause.]

### ASSIGNMENTS OF ERRORS

Comes now the claimant-appellant, Young Brothers, Limited, and hereby assigns as error in the proceedings, orders, decision, judgment and decrees of the above District Court in the above-entitled action, the following:

1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949;

2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949;

3. That the District Court erred in holding and deciding that the Tug "Kolo" was liable in rem for the loss of the Sampan "Tenyo Maru" under the facts of the case;

4. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo", being without authority to take the tow of the Sampan "Tenyo Maru" and such lack of authority being known to the libelant-appellee, owner of the Sampan "Tenyo Maru", or such knowledge being imputable to him, the Tug "Kolo" is not liable for the loss of the Sampan occurring in the course of the unauthorized tow.

5. That the District Court erred in holding and deciding that the Tug "Kolo" was solely liable for the full damage suffered by the libelant.

6. That the District Court erred in holding and deciding that the Master of the Tug "Kolo" was

negligent in cutting the towline on the Sampan "Tenyo Maru" and that said negligence was the sole cause of the loss of the sampan.

7. That the District Court erred in holding there was no necessity for cutting the tow loose under the circumstances and that in so doing the Master of the Tug "Kolo" failed to exercise the degree of care and skill required of a tug master in open sea towage.

8. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo" acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the Tug "Kolo" and to save the Tug "Kolo" itself; that the Sampan "Tenyo Maru", being awash, could not be towed to safety; and that the course pursued by the Master of the Tug "Kolo" was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case.

9. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo" used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the Sampan "Tenyo Maru" and if the course he followed to save his vessel and crew



was erroneous, such course was legally excusable under the circumstances existing in the case.

10. That the District Court erred in not holding and deciding that the loss of the Sampan "Tenyo Maru" was caused by her unseaworthy condition, which condition was known to the libelant-appellee at the time that the tow of the Sampan "Tenyo Maru" was undertaken.

11. That the District Court erred in not holding and deciding that the Sampan "Tenyo Maru" could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel.

12. That the District Court erred in not holding and deciding that no damages should be awarded against the Tug "Kolo" for the loss of the Sampan "Tenyo Maru" in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him.

13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of \$8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the Sampan "Tenyo Maru" was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the Tug "Kolo" for tow to Honolulu, which unseaworthy condition was known to the libelant and that at

least one-half of the total damage resulting from the loss of the Sampan "Tenyo Maru" should be awarded against the libellant-appellee.

Dated: Honolulu, T. H., this 25th day of August, 1949.

SMITH, WILD, BEEBE &  
CADES

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Aug. 25, 1949.

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[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF APOS-  
TLES ON APPEAL AND P R A E C I P E  
THEREFOR

To the Libellant Above Named:

To Robertson, Castle & Anthony, 312 Castle &  
Cooke Building, Honolulu, Hawaii, Proctors  
for Libellant:

To William F. Thompson, Jr., Clerk, United States  
District Court for the District of Hawaii:

The Claimant, Appellant herein, does hereby designate and request that the record on appeal in the above-entitled action shall include the following:

1. The Libel, Interrogatories and Monition, filed October 12, 1948;
2. Stipulation for Libellant's Costs, filed October 12, 1948;

3. Claim of Owner, Young Brothers, Limited, and Release Bond of the claimant and owner, filed October 12, 1948;

4. Answer to Interrogatories, filed November 5, 1948;

5. Findings of Fact and Conclusions of Law, filed June 8, 1949;

6. Decree of District Court filed June 8, 1949;

7. Bill of Costs and Affidavit;

8. Notice of Appeal and Order Allowing Appeal, filed June 18, 1949;

9. Order Authorizing Certified Check in Lieu of Bond, filed June 20, 1949;

10. Bond for Costs on Appeal, filed June 21, 1949;

11. Order Extending Time for Filing of Record on Appeal and Docketing of Appeal, filed July 27, 1949;

12. Citation on Appeal;

13. Assignments of Error Proposed by Appellant;

14. Transcript of the Record of all Proceedings;

15. All of the Clerk's minutes in all matters pertaining to the above-entitled case.

Dated: Honolulu, T. H., this 25th day of August, 1949.

SMITH, WILD, BEEBE &  
CADES

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Aug. 25, 1949.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings and exhibit of record in said cause:

Libel, Interrogatories, and Monition.

Stipulation for Libellant's Costs.

Claim of Owner.

Release Bond.

Answer.

Answers to Interrogatories.

Bill of Costs and Affidavit.

Findings of Fact and Conclusions of Law.

Decree.

Notice of Appeal and Order.

Order Authorizing Acceptance of Certified Check  
in Lieu of Bond.

Bond for Costs on Appeal.

Order Extending Time for Filing of Record on  
Appeal and Docketing of Appeal.

Assignments of Errors.

Appellant's Designation of Apostles on Appeal  
and Praecept Therefor.

Citation.

Libellant's Exhibit No. 1.

I further certify that included in said record on appeal is a copy of the court minutes of April 25, 26, May 12, and 23, 1949, and of the Transcript of Proceedings had on April 25, 26, and May 23, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A.D. 1949.

[Seal]     /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

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In the United States District Court  
For the Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

THE TUG "KOLO," her boats, engines, machinery,  
tackle, etc.,

Respondent.

### TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing at 9 o'clock a.m., April 25, 1949, in the United States District Court, Honolulu, T. H.

Before: HON. J. FRANK McLAUGHLIN,  
Judge.

Appearances:

J. EDWARD COLLINS, Esq.,  
SMITH, WILDE, BEEBE, and CADES,  
Proctors for Claimant.

WILLIAM F. QUINN, Esq.,  
ROBERTSON, CASTLE, and  
ANTHONY,  
Proctors for Libellant.

April 25, 1949

The Clerk: Admiralty No. 409, John Cho, Libellant, vs. The Tug "Kolo," her boats, engines, machinery, tackle, etc., Respondent, for trial.

Mr. Quinn: Ready for the Libellant, your Honor.

Mr. Collins: Ready for the Libellee, your Honor.

The Court: Very well, the parties indicate that they are ready. Is there an opening statement from you, Mr. Quinn?

Mr. Quinn: Yes, if the Court please, I would like to call the Court's attention to the number of the allegations of the Libellant which are admitted in the Answer, and also certain matters in the Interrogatories, which were likewise disclosed by the Respondent.

The Court: I have read them, but I haven't correlated them. Just what is the significance of these admissions?

Or, perhaps first you want to review them.

Mr. Quinn: I would like to, if the Court please. I would like also to ask the Court's indulgence; we

have three or four witnesses here who I do not believe are in full and proper attire in the sense of coats and ties.

The Court: That will be all right. My point is, I want people to realize when they come into this Court, they are not coming into police court; or, in fact, they shouldn't go to a police court that way. It is not a picnic we are having here, and I want them to show proper respect, not for me, but for the Court, and I am sure you understand and agree.

Mr. Quinn: The first paragraph of the Libel alleging ownership of the Libellant was not admitted.

The second paragraph——

The Court: Just a minute. The first paragraph of the Libel, alleging ownership of the sampan, was not admitted?

Mr. Quinn: That is correct, your Honor.

The second paragraph was admitted by paragraph 2 of the Answer; that is, that the Kolo is a tug of a particular description and that it is owned by Young Brothers, a Hawaiian corporation.

Paragraph 3 of the Libel was likewise admitted, which alleged that on April 3, 1948 the Tenyo Maru, a sampan, went aground on a reef off Molokai, and that on April 6 the tug Kolo and the tug Mahoe, also owned by Young Brothers, towed the Tenyo Maru off the reef and into the harbor at Kaunakakai.

Paragraph 4, likewise admitted, stated that the Tenyo Maru, during the night of April 6, remained at Kaunakakai and had a rip in her bottom and

could not be patched either from the inside or outside at Kaunakakai, and a pump was manned to keep the vessel dry during the night; and the Captain of the Kolo came aboard the Tenyo Maru to advise and assist the Libellant with respect to the condition of the damaged vessel. That is likewise admitted in Paragraph 4 of the Answer. [2\*]

Paragraph fifth—

The Court: Excuse me. We might as well take it up now. I gather from Mr. Collins' uneasiness that he doesn't fully agree.

Mr. Collins: If your Honor please, I don't know whether it is proper to interrupt Counsel. I prefer not to do it, but I think there are some inaccuracies in his statement of admissions. I believe the pleadings speak for themselves. We have admitted some of the portions that he specifies, and others of them we have no information or belief on which to form an opinion.

The Court: Admitted in part?

Mr. Collins: Yes, your Honor.

Mr. Quinn: I should like to call the Court's attention to one particular allegation which I think brought that rise out of Mr. Collins.

In Paragraph 4 it states: "The Captain of the Kolo came aboard the Tenyo Maru to advise and assist Libellant with respect to the condition of the damaged vessel. The admission, as I recall it was stated in this statement of paragraph 4 of the Answer, that it further admits that the Captain of

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\* Page numbering appearing at top of page of original Reporter's Transcript.



the Kolo went aboard the Tenyo Maru at the pier at Kaunakakai to ascertain her condition. To that extent they might differ; I will agree with Mr. Collins, it will speak for itself.

Paragraph fifth of the Libel states that about noon on [3] April 7 the Kolo took the Tenyo Maru in tow, the latter retaining a crew of three aboard to man the pump and keep up with leakage. And between Molokai and Oahu the damaged sampan Tenyo Maru began to take water in excess of the capacity of the pumps, and sometime thereafter the decks were awash, the Kolo cut the tow lines, and proceeded to pick up the crew of the sampan.

In somewhat different language Paragraph fifth of the Answer admits the substance of these allegations, except that it denies anything not admitted and calls for strict proof.

An examination of the two, I think, will reveal that the allegation not admitted would be the conclusion of the known unseaworthiness of the vessel.

The Court: Is this an instance of the art of admiralty where you both talk of the vessel's being awash but neither of you mention its being sunk?

Mr. Quinn: That is very material to the case for the Libellant.

The Court: I take it it did sink.

Mr. Quinn: We cannot show that it did and, on the contrary, one element of our case will be that it did not sink at the time of the cutting of the tow line and could have been towed into Honolulu.

Paragraphs 6 and 7 of the Libel, dealing with the amount of damage and with the conclusions with

respect to the liability [4] of the Respondent, are, of course, denied.

Paragraph eighth, the jurisdiction of this Court, admiralty and maritime jurisdiction, is admitted.

Paragraph ninth, containing a routine recitation that the premises are true and within the jurisdiction, is admitted, except for the truth of the allegation.

In the Interrogatories the certain repetitious admissions were made. The ownership of the Kolo by Young Brothers was admitted.

In Paragraph 2, in response to a question: "On said date who operated said tug?" Young Brothers has replied that Joseph Kahiapo was the master of the tug.

And in response to Interrogatory No. 3, concerning the hour when the tug took the Tenyo Maru in tow, it was responded: at 12:15 p.m.

In response to Paragraph 4—to Interrogatory 4: "Did the person operating said tug know that the aforesaid sampan had a rip in her bottom at the time she was taken in tow?" the answer is in the affirmative.

Paragraph 5: "What was the prevailing wind on that day?" The answer is "Normal trade."

"At what hour did said tug and said sampan enter the Molokai Channel?" The answer is 1:45 p.m.

The Claimant, Young Brothers, then affirms it has no knowledge of the speeds and conditions in the channel, and in response [5] to Interrogatory

11: "At what hour did the person operating said tug learn that said sampan was taking water badly?" it is replied: 3 p.m.

In response to the question: "What action did said person take upon learning of the sampan's difficulty as aforesaid?" it is stated that they abandoned the tow and picked up the crew, and that this was one and a half hours from Laau Point, or eight or ten miles, Laau Point being the point on Molokai closest to Oahu.

In response to Interrogatory 14: "At what hour did the captain of the Kolo order that the towline be cut?" the answer is: Between 3 and 3:30 p.m. And, in response to Interrogatory 15, that that occurred in about the middle of the channel; and the deck log of the Kolo is then annexed to the Interrogatory.

It is the view of the Libellant, if the Court please, that the Tenyo Maru was unseaworthy when in the port of Kaunakakai; that her unseaworthiness was known to the master of the Kolo; that when the master of the Kolo took the Tenyo Maru in tow, knowing it to be unseaworthy, and towed her into the middle of the channel, whereupon she was cut loose, he was liable, and the Kolo was liable for a maritime tort; that the allegations of the Respondent in the Answer with respect to the authority of the master are immaterial in so far as this is an admiralty action in rem against the noxal instrument so-called; and so long as the person in charge of that vessel is in rightful [6] possession, the vessel

will be liable, irrespective of actual or apparent, or other authority in the master. And, additionally, if the Court should find that that is not true, it is our position that there was authority in the master of this vessel.

It is likewise our position that the Kolo failed to take proper steps to salvage or to save the Tenyo Maru when she began to take additional water in the channel; that in cutting the tow line without making some efforts to continue the tow, the master of the Kolo was negligent in a maritime sense and failed to take due and proper care of its tow; and, as a result of that action, the tow was lost when it need not have been.

The Court: I still would like to know why neither of you admit that the thing sank. It may not be material, but from the standpoint of my education, why don't either of you mention that the thing went to the bottom?

Mr. Quinn: As far as I know, your Honor, I suppose it did at some time, but it did not within the knowledge or notice of the master of the Kolo or of the master of the Tenyo Maru.

The Court: That is something that neither of you actually know?

Mr. Quinn: We will endeavor to show that it would not have sunk, if the Court please.

The Court: All right. That completes your opening statement? [7]

Mr. Quinn: Yes, your Honor.

The Court: Mr. Collins?

Mr. Collins: I would like to reserve my statement, if your Honor please, until the conclusion of the Libellant's case.

The Court: Very well. You may call your first witness.

Mr. Quinn: Sam Kalani, Jr.

The Court: I will ask that you all bear with me in case there are nautical terms utilized by the lawyers and witnesses and educate me as we go along.

Mr. Quinn: May we ask that the Court bear with the Libellant on the same ground.

SAMUEL KALANI, JR.

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Will you please state your name, age, residence, occupation and citizenship, and talk loud and distinctly.

The Witness: Well, my name is Samuel Kalani, Jr.

The Court: Just a minute. That is spelled (spelling) K-a-l-a-n-i?

The Witness: (Spelling) K-a-l-a-n-i.

The Court: Jr. [8]

The Court: Your age?

The Witness: January 4, 1924.

The Court: You were born in 1924?

The Witness: Yes.

(Testimony of Samuel Kalani, Jr.)

The Court: Where do you live?

The Witness: 517 Keawe Street.

The Court: Here in Honolulu?

The Witness: Yes.

The Court: What is your occupation?

The Witness: Fisherman.

The Court: Employed by anyone? Are you employed by anyone?

The Witness: Used to be by John Cho.

The Court: Aboard his ship or vessel——

The Witness: Yes.

The Court: The name of which was what?

The Witness: Tenyo Maru.

The Court: And are you a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Are you sure of that?

The Witness: Yes.

The Court: All right. Have you ever been a witness [9] before?

The Witness: No.

The Court: Have you ever been in court before?

The Witness: No.

The Court: You appear to be quite scared. There is no reason for being scared. Just listen to the questions the lawyers put to you and reflect on what the true answer is, give it as best you can in a clear, distinct tone of voice so that everyone can hear you.

(Testimony of Samuel Kalani, Jr.)

Mr. Quinn.

Mr. Quinn: Thank you, your Honor.

Direct Examination

By Mr. Quinn:

Q. Sam, were you employed by John Cho on or about the first part of April, 1948?

A. Yes, sir.

Q. Will you speak up so I can hear you.

A. Yes, I was.

Q. That's fine. And what was your position with respect to the Tenyo Maru?

A. Captain of the boat.

Q. You were captain of the Tenyo Maru.

The Court: Excuse me. I have inferred that the man sitting beside you is John Cho.

Mr. Quinn: That is correct, your Honor. [10]

Q. (By Mr. Quinn): Sam, on about April 3 of last year did the Tenyo Maru have some trouble?

The Court: The question was: Did the Tenyo Maru, to your knowledge, on April 3, 1948, have some trouble?

The Witness: No, no trouble at all.

Q. (By Mr. Quinn): On or about the third of April did you make a trip in the Tenyo Maru up to Molokai? A. Yes.

Q. Was there anything unusual that happened on that trip?

A. Well, on the way over there something happened on the reef.

Q. You went on the reef? A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. How did that happen, Sam?

A. Well, as I was going into Kaunakakai, I was taking my range light on my way in. I was probably close to the pier, and there was a boat in there; probably it was the Adventure.

The Court: That is the name of that other vessel?

The Witness: Yes.

Q. (By Mr. Quinn): The other vessel in this case?

The Court: The one he described as being somewhere when he was going in.

The Witness: She had her running lights, everything was on. There was a tug boat coming out, so I gave her a little [11] room, and I don't know, just went on the reef.

Q. How did you try to get off the reef, Sam?

A. I tried to back it out, tried with my outboard motor. I had a little outboard motor on. Couldn't do anything.

Q. Did you ever get the Tenyo Maru off?

A. No.

Q. Did anybody ever get it off?

A. No. Just, I guess it was on the sixth, April 6, when the Mahoe pulled it off.

Q. The Mahoe pulled it off; is that right?

A. I forget the tug's name.

The Court: What is bothering you? The dates? Is that what is bothering you? Is it the date that is bothering you, as to whether it is April 6 or 7 or 3? You don't remember the date; is that it?



(Testimony of Samuel Kalani, Jr.)

Mr. Quinn: Well, the dates are stipulated, if the Court please, so I will try not to stir up sand here.

Q. (By Mr. Quinn): A couple of days after you went on the reef, were you towed off by tugs, or what? A. Yes.

Q. And where did they take you, Sam?

A. To Kaunakakai, close to the pier.

Q. And when you got to Kaunakakai, what condition was the Tenyo Maru in?

A. She was—she had about one foot and a half damage [12] under her hull.

The Court: Just a minute.

Q. (By Mr. Quinn): Whereabouts on the hull?

The Court: Right under the hull?

The Witness: Right under where the motor is.

Q. (By Mr. Quinn): Right under where the motor is? A. Yes.

Q. Is that toward the bow or toward the stern?

A. I guess it was right in the middle of the boat.

Q. Was the Tenyo Maru taking water?

A. Yes, she was taking—she was taking water and probably had a pump on him, too, tried to pump the water out the best way they could, and from then on we tried to tow it back to Honolulu.

Mr. Quinn: Sam, this lady has to take down everything you say, so you speak slowly and loud so she can understand.

Mr. Collins: If your Honor please, loud enough so we can hear.

The Court: Yes, and I want to hear, too. And,

(Testimony of Samuel Kalani, Jr.)

Sam, don't run your words together. You know what happened, but we don't, and the only way we can find out is from you and others who were there.

The last I knew was that this tug took the Tenyo Maru off the reef and towed it to the pier at Kaunakakai, and that there was a foot and a half of damage to the Tenyo Maru's hull under [13] the motor, about the middle, and she was taking water; and there was something about a pump. After the pump I didn't get what he said.

Q. (By Mr. Quinn): Will you tell the Court, Sam, what you did about the water that was coming in through the damaged hull?

A. On the boat we had a water pump, you know.

The Court: Water pump?

The Witness: Water pump, which was pumping out, and we had a hand pump also. One of my boys was pumping with the hand pump. The other one was with the water pump.

Q. (By Mr. Quinn): You had a motor driven pump and a hand pump?

A. Yes, and a hand pump.

Q. During that night when you were in Kaunakakai, were those pumps enough to keep up with the water coming in? A. Yes, it was.

Q. During that night, Sam, did you try to fix up the damaged hull at all?

A. I tried and cannot.

Q. Why?

A. Because she was under the motor.

(Testimony of Samuel Kalani, Jr.)

Q. Under the motor? A. Yes.

Q. In a position where you couldn't get to it from the [14] inside?

A. Yes. Couldn't even get in there.

Q. How about the outside?

A. The outside was in the water.

Q. It was under water and there was no way you could repair it under water; is that right?

A. Yes.

Q. Was the tug Kolo at Kaunakakai that night?

A. Yes, she was.

Q. Who was the captain of the Kolo, do you know?

A. Well, I know his first name is Joe.

Q. Did the captain of the Kolo come on the Tenyo Maru? A. Yes, he was, tried to help.

Q. Tried to help, see if he could get behind the engine, is that right? A. Yes.

Q. Did you talk to the captain of the Kolo about towing you back to Honolulu? A. No.

Q. When were you started on your tow back to Honolulu? A. April 7.

Q. The next day? A. Yes.

Q. At about what time?

A. Just about noon, I guess. [15]

Q. About noon. Will you tell the Court, Sam, what happened as you started on your tow out into the Molokai Channel.

A. From Kaunakakai, from the pier we start off, and we came to, I guess it was about 15 miles

(Testimony of Samuel Kalani, Jr.)

from Kaunakakai. Before then she was—my pump was keeping up with the water, which she was all right.

Q. Slower, now, Sam.

A. (Continuing): It was also windy, pretty rough.

The Court: What?

The Witness: It was windy and pretty rough.

The Court: Windy and rough?

The Witness: Yes.

A. (Continuing): So can't keep up with that water no more, so she start to lower down. The boat went down a little. Each time we went, she went down a little.

The Court: Just go back there a minute.

Q. (By Mr. Quinn): And then what happened, Sam? Speak up so I can hear you back here.

A. So each time she went down, then the water start to catch my water pump. We can't pump no more. The water was right below the gunwale of the boat. Then from then on I called captain of the Kolo, just wave at him because it was a pretty long distance from where he was up to my boat. He didn't even see me wave at him, so from then on he just cut his rope off.

Q. Did you say Sam, that when the water came up to about [16] the gunwales—Is that the same thing as the sponsons, the pieces that stick out on a sampan? A. Yes, the same.

Q. When the water came up to about there, you waved to the captain of the Kolo; is that right?

(Testimony of Samuel Kalani, Jr.)

A. Yes.

Q. And the captain of the Kolo, did he respond in any way?      A. No.

Q. What did he do?

A. Just do nothing at all, just cut his rope.

Q. He just cut his rope?      A. Yes.

Q. Then what happened to you?

A. Well, from then on he came close to where we were and we swam to the tug.

Q. You swam to the tug?      A. Yes.

Q. Then what did the Kolo do?

A. She just came alongside and took us on, and we came toward Honolulu.

Q. You came to Honolulu?      A. Yes.

Q. Where was the Tenyo Maru?

A. She was there floating in the water there.

Q. With water up to the gunwales?

A. Yes.

Mr. Quinn: No further questions.

#### Cross-Examination

By Mr. Collins:

Q. How long were you captain of the Tenyo Maru?      A. About three years.

Q. Two years?      A. About that.

Q. Were you on the Tenyo Maru when she was being pulled off the reef?      A. Yes.

Q. Was the pump going then?

A. Well, we started our pump when she was at the pier.

Q. Was the pump going when she was on the reef?

(Testimony of Samuel Kalani, Jr.)

A. On the reef we had no pump at all, until we pulled it to the pier.

Q. Did you have the gasoline—The pump was a gas pump?      A. Yes.

Q. Did you have that on board when you were on the reef?      A. No.

Q. Did you have the hand pump on board when you were on the reef?      A. Yes, we have.

Q. Were you working the hand pump at all?

A. Yes.

Q. When the Tenyo Maru was being pulled from the reef to the pier, were you working the hand pump?

A. The hand pump and the gasoline pump also.

Q. Now, this hull damage that you spoke of, did you go down and look at it?      A. Yes.

Q. Did you go under the engine?

A. No, you can't go.

Q. Then how were you able to see how much damage there was?

A. You could see right through the engine where she was sitting; you could see that damage.

Q. The engine was not over the break in the hull?

A. She was over the break of the hull, but then I put my head under the motor and looked at the damage.

Q. How much water was there in the Tenyo Maru when she was at the pier?

A. Probably she had no water at all, because we had a pump working then.

(Testimony of Samuel Kalani, Jr.)

Q. Well, with the pump working, how much water was there in it?

A. She has only about one foot, I guess.

Q. One foot. You mean when she was pulled in off the reef and up to the pier there was only one foot of water in it? [19]

A. No; that is when the pump was working.

Q. When you say there was only one foot, when was there only one foot?

A. When we came to the pier, from the reef to the pier, she has quite a load of water in it, about half way, I guess.

Q. With this hand pump you spoke of, did you and your men have to keep working it all the time?

A. Yes.

Q. It is a question of pulling a lever; is that right? A. Yes.

Q. Where was that pump located?

A. Right where the cabin is.

Q. Is that on the main deck? A. Yes.

Q. When did you start the gas pump going?

A. As soon as we came at the pier.

Q. How much water was there in it before you put the gas pump on it?

A. Oh, she was, about, quite a way up the boat.

Q. How much?

A. About four or five foot.

Q. Three or four feet. And when did it go down to one foot?

A. That is when we start to pump the motor.

(Testimony of Samuel Kalani, Jr.)

Q. As soon as you started the gas pump going, it went [20] down to one foot? A. Yes.

Q. Was the gas pump going all night?

A. Yes, all night.

Q. Were you on board all night? A. Yes.

Q. Did you leave to go for chow any place?

A. No.

Q. You got your chow on board?

A. Yes.

Q. When you saw this damage in the hull, how much water was there there?

A. Well, you see, the boat was one side a little so this one foot of water—probably on one side of the sampan you could see that damage.

Q. Was the hole right down at the bottom?

A. No. In the middle of the boat, quite on the side.

Q. Was the hull above the water in the boat or below the water in the boat?

A. You mean the hull?

Q. Yes. But was the water inside the hull higher than the break in the plank or was the water in the hull below it? A. Below.

Q. It was below it, you say? A. Yes. [21]

The Court: Excuse me. It may not be material, and yet it may be. Sometimes you talk of damage to the hull and other times talk about a hole in the hull. I don't know whether it was a real hole or whether it was a crack or an opening of the seams. Perhaps it may be significant to find out.



(Testimony of Samuel Kalani, Jr.)

Q. (By Mr. Collins): Suppose you tell us just what this hole looked like.

A. It was just about a foot and a half. She was wide, oh, about three inches wide.

Q. Well, is that a plank that had torn out of there? A. Yes.

Q. About three inches wide, you say, and about a foot and a half long? A. About.

Q. Was the hand pump going at the same time the gas pump was going, when she was at the dock?

A. Yes.

Q. Was it necessary to keep both of them going?

A. Yes.

Q. The hand pump was going all night?

A. Yes.

Q. How many men were on board the ship?

A. Three of us.

Q. Did you work the pump? A. Yes. [22]

Q. How long did you work it?

A. Well, we had a shift every hour.

Q. You mean you worked it for an hour and then someone relieved you? A. Yes.

Q. But it was working all night long?

A. All night.

Q. Did the gas pump stop at all? A. No.

Q. And you say that as soon as the gas pump started, the water went down from four feet to about a foot? A. Yes.

Q. And it stayed that way all night with both pumps going? A. All night.

(Testimony of Samuel Kalani, Jr.)

Q. Did you make any attempt to patch it?

A. Yes, we tried and couldn't get it.

Q. Did you try to patch it on the outside?

A. You can't.

Q. What attempt did you make to patch the inside?

A. See, we can't do nothing, so we just let it go.

Q. You didn't actually do anything, did you?

A. Yes.

Q. Did you talk to—Was Mr. Cho there?

A. Yes. [23]

Q. Did you talk to him at all about how it should be fixed up? A. We tried, talked.

Q. Did you talk to him about having it brought to Honolulu? A. No.

Q. He didn't say anything to you about it, and you didn't say anything to him about it?

A. He told me something; he said, "Bring the boat over."

Q. Did you tell him anything about its condition? A. Yes.

Q. What did you have to say about it?

A. Oh, just told him that the boat, how the damage is, so he went down and he looked at it.

Q. When did he tell you that he was going to take it here?

A. As soon as we got it off the reef.

Q. Before it got to the pier?

A. Just when we got to the pier, April 6. That is when we took the boat off. April 7 is when the boat got——

(Testimony of Samuel Kalani, Jr.)

Q. I don't understand you.

A. April 6 when they pulled the Tenyo Maru off the reef and April 7 we left over there.

Q. I know, but when did Mr. Cho first tell you he intended to bring the boat here? [24]

A. Well, as soon——

Q. Well, was that while it was on the reef?

A. No.

Q. When did he tell you?

A. He told me just get the water off so much and pull that boat back to Honolulu.

Q. Was that when it was at the pier?

A. Yes.

Q. Was it that night or the next morning?

A. Morning.

Q. The next morning. Did you say anything to him when he suggested that the sampan be towed to Honolulu? Did you say anything about whether it would be able to stay above water or not?

A. No.

Q. He didn't ask you whether it would or not?

A. No.

The Court: I take it by inference that Mr. Cho, the owner of the boat, apparently, according to the allegation, was one of the three men aboard this vessel all of the time?

Mr. Quinn: I don't think so, your Honor. I think the proof will come out very shortly. Mr. Kalani was master and had two crewmen. Mr. Cho,

(Testimony of Samuel Kalani, Jr.)

in fact, came up there after the boat went on the reef.

The Court: Well, Mr. Collins and the witness were [25] just talking about the situation when the Maru was on the reef, and I gathered that Mr. Cho was aboard the vessel when it went aground.

Mr. Quinn: He got up there and got aboard after it went aground. It is true he was on the Tenyo Maru while it was on the reef. That will come out shortly.

Mr. Collins: I believe it was on the reef a couple of days, your Honor.

The Court: Oh, I see.

Q. (By Mr. Collins): Did the gasoline pump stop at all during the night? A. No.

Q. How large a pump is that?

A. Really I don't know how large it is.

Q. Do you know how many horsepower it is?

A. No, I don't.

Q. Is it part of the sampan's equipment?

A. No.

Q. It was brought on board the sampan at Kaunakakai, was it? A. Yes.

Q. Where was it put?

A. Right in front of the bow.

Q. On the main deck? A. Yes. [26]

Q. And you just ran a line down into the hull, is that it? A. Yes.

Q. Did you suggest to the captain that the pump be brought on board?

(Testimony of Samuel Kalani, Jr.)

A. Yes, I tried to get——

Mr. Collins: I don't hear you.

The Court: He is the captain.

Mr. Quinn: I object, in order to stop it for a moment. He is the captain.

Mr. Collins: Strike the question, please.

Q. (By Mr. Collins): Did Mr. Cho——

Mr. Collins: Strike that.

Q. (By Mr. Collins): Did you ask Mr. Cho to have a gas pump put aboard? A. Yes.

Q. You say the captain of the Kolo was named Joe? A. Yes.

Q. How long had you known Joe?

A. Since when we was in Kaunakakai.

Q. You didn't know him before that?

A. No.

Q. I believe you also said you did not talk to Joe at all about this tow. A. No. [27]

Q. Did you talk to him about the condition of the sampan? A. Yes.

Q. What did you say to him about it?

A. Just told him, What you think about it, can do anything? He said, "no."

Q. Did you say anything about its being able to stand a tow to Honolulu? A. No.

Q. You didn't discuss towing to Honolulu at all?

A. No.

Q. At the time the Kolo took the Tenyo Maru in tow, you knew she was being towed to Honolulu, didn't you? A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. Did you say anything to Mr. Cho about it?

A. No.

Q. Did you say anything to Joe about it?

A. No.

Q. How many men did you have on board the sampan when she was being towed? A. Two.

Q. Two besides yourself? A. Yes.

Q. That is the regular crew? A. Yes.

Q. Was the gasoline pump working all right that morning? [28] A. Yes.

Q. Was the hand pump being worked that morning, too? A. Yes.

Q. All the time there was a man on the hand pump? A. Yes.

Q. Did the gasoline pump work all the time until the sampan started to go down?

A. Well, as I said a while ago, when we was coming, she was pretty rough and windy, and then on the wave, hit the boat and water on the boat, and the gasoline motor pump, she died off.

Q. Did the gasoline pump actually go under water itself? A. Well, no.

Q. You didn't see it go under water?

A. She went with the boat.

Q. But before you left her, was the gasoline pump under water, or was she still above water?

A. She was above water.

Q. But she wasn't working? A. No.

Q. How long before you left the sampan did

(Testimony of Samuel Kalani, Jr.)

the gasoline pump stop working?

A. You mean how long I left the sampan—I beg your pardon?

Q. Well, how long before you left the sampan did the gasoline pump stop; ten minutes, fifteen minutes? Do you recall [29] how long a period it was?

A. Oh, just about half an hour, I guess, before that when she stopped.

Q. The man was working the hand pump all the time? A. Yes.

Q. As captain of the Tenyo Maru, you worked at times in this channel, didn't you? A. Yes.

Q. You have been on board a boat in that channel a number of times; isn't that right? A. Yes.

Q. You said it was rough there. Was it rougher than usual in that channel?

A. Just about usual, I guess.

Q. Just about usual. Was it any windier there than usual?

A. The wind was pretty strong.

Q. Unusually strong? A. Yes.

Q. About how strong was it?

A. That I really don't know.

The Court: What?

The Witness: I don't know, really.

Q. (By Mr. Collins): Would you say it was a little bit stronger than usual, or a lot stronger than usual? [30] A. It was a little stronger.

Q. Just a little stronger than usual. You kept

(Testimony of Samuel Kalani, Jr.)

watching the water in the sampan when you were being towed, didn't you?      A. Yes.

Q. Did you find the water increasing or not when the gasoline pump was working?

A. Well, she was increasing.

Q. Was increasing. Increasing slowly or fast?

A. Fast.

Q. All the time she was coming out the water was increasing fast?      A. Yes.

Q. Did you signal to the Kolo that she was taking on water?      A. Yes.

Q. When did you signal?

A. Oh, about half an hour; the gasoline pump died off and she was taking in water faster than—I started to wave back to the captain of the Kolo.

Q. About half an hour after she left the pier?

A. No; after my gasoline motor died off.

Q. After the pump stopped?      A. Yes.

Q. Did you give any signals to the Kolo before that [31] time?      A. No.

Q. Even though she was taking in water, you didn't attempt to tell them that?      A. No.

Q. Tell me how this hand pump works. Can you describe it?

A. Well, she is just a long stick, a pipe running through the hull.

Q. Is it like an automobile pump?

A. Just so long, pretty long, and she got a round pipe right on the main deck down to the bottom of the boat, which could suck water and pull the hand pump and pump up and down.



(Testimony of Samuel Kalani, Jr.)

Q. Is it like an automobile pump or bicycle pump with handles on it, and you pump up and down?

A. Just a long stick, and you hold the handle of the stick.

Q. Just a stick. Was a man pumping there right up to the time that you went over the side?

A. No.

Q. When did the man stop pumping?

A. As soon when she is giving water and the water was coming in fast, and it is no use to pump with hand pump no more.

Q. Did you stop pumping with the hand pump before or [32] after the gas pump stopped?

A. After.

Q. How long did you pump with the hand pump after the gas pump stopped?

A. About half an hour.

Q. You say there was about a half hour there when neither the hand pump nor the gas pump was pumping?

Mr. Quinn: I don't recall his saying that.

The Court: He didn't actually say that. You are putting some things together.

Q. (By Mr. Collins): Well, was there any period when neither of the pumps were pumping?

A. Well, as soon as she was taking water in fast, then from then we didn't use the pump no more, so we didn't pump.

Q. How did you signal to the tug?

(Testimony of Samuel Kalani, Jr.)

A. Just wave at them.

Q. Did you shout anything to them?

A. No, you can't shout because they can't hear you.

Q. How long a line was out?

A. Oh, it was about twenty to thirty fathom.

Q. How long?

A. Twenty to thirty fathoms.

Q. Twenty fathoms?

A. To thirty fathoms.

Q. Twenty to thirty fathoms. [33]

The Court: That is the length of the tow line?

Mr. Collins: Yes.

Q. (By Mr. Collins): And do you know how long a fathom is, how many feet? A. Yes.

Q. How many feet is it? A. Six.

Q. Did you have a megaphone on the Tenyo Maru? A. No.

Mr. Collins: I believe that is all.

The Court: Redirect?

#### Redirect Examination

By Mr. Quinn:

Q. While you were in Kaunakakai, after you had come off the pier, how many pumps did you have going?

A. Had gasoline pump and hand pump.

Q. And were those pumps able to keep up with the water coming in through the damaged hull?

A. Yes.

Q. And when did the water start catching up or beating the pumps, Sam?

(Testimony of Samuel Kalani, Jr.)

A. In the channel when she was——

Q. When you first entered the channel?

A. It was in the channel already.

Q. In the channel? [34] A. Yes.

Q. Did the water come in faster than you could pump while the gas pump was working?

A. Well, she could really pump fast enough, but, as I say, it was pretty rough, wind, a little *while* came on the boat and touched my gas motor, and she died off, and from then on the water came in faster.

Q. And that was about a half hour before you stopped pumping with the hand pump?

A. Yes.

Q. You stopped pumping with the hand pump why?

A. Because it is no use, because you can't keep up with the hand pump.

Q. When you first got into the channel, your pumps were still keeping up with the water coming in; is that right? A. Yes.

Q. Now, Sam, did the spray start affecting the operation of your pump before you started to go down somewhat because of additional water or after you started to go down because of additional water in the hull?

A. Before. Gradually she was going down, so it starts getting lower, so spray come on the boat.

Q. The hull started gradually going down; after it went down somewhat, then the spray started coming over and affecting the pump; is that right?

A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. And the hull was going down because it was taking more water than it had before; is that right or wrong? A. Right.

Q. What was the condition of the Tenyo Maru at the time you first signaled the Kolo?

A. She was right on her gunwales, and from then on I signaled the Kolo. Was floating on the water.

Mr. Quinn: No further questions.

### Recross-Examination

By Mr. Collins:

Q. Was any part of the main deck under water?

A. No.

Q. The stern was not under water at all?

A. No.

Q. Did you have any canvas of any sort protecting the pump? A. Yes.

Q. How did you have your canvas set up?

A. Well, you can't put the canvas under because probably she was down a little, just a small little canvas.

Q. You didn't have any canvas covering the entire pump? A. No.

Q. How large a piece of canvas did you have? Was it as big as that table? [36]

A. Just a little bigger.

Q. Was it as big as this table the girl is writing at? About that size?

A. It is a little bigger. About that size (indicating).

(Testimony of Samuel Kalani, Jr.)

Q. About this size? (indicating). How big is the pump?

A. About this wide (indicating).

Q. Did you have the canvas thrown on top of the pump?      A. Yes.

Q. You said that you were captain of the Tenyo Maru for a couple of years.      A. Yes.

Q. Do you know a Walter Paula?

Mr. Quinn: I object, your Honor; improper re-cross-examination.

The Court: It seems to be new matter.

Q. (By Mr. Collins): Were you registered as the master of the Tenyo Maru at the time she went on the reef?      A. No.

Q. You were?      A. No.

Q. You were not. Who was the registered master, do you remember?      A. No.

Mr. Collins: That is all.

Mr. Quinn: No further questions. [37]

The Court: You are excused.

(Witness excused.)

The Court: We will take a short recess.

(Recess had.)

Mr. Quinn: Will you take the stand.

### JOHN Y. K. CHO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

(Testimony of John Y. K. Cho.)

The Court: Please state your name, age, residence, occupation, and citizenship.

The Witness: John Y. K. Cho; age 23; have a fish market, wholesale and retail; and am a citizen of the United States.

The Court: And you live in Honolulu?

The Witness: Yes.

The Court: Take the witness.

### Direct Examination

By Mr. Quinn:

Q. Mr. Cho, were you the owner of the sampan known as the Tenyo Maru?

A. Yes, sir, I am the owner of the sampan, the Tenyo Maru.

Q. That is the vessel that was involved in the incident of going on the reef and the subsequent towage that you have [38] heard testimony about?

A. Yes, sir.

The Court: Incidentally, and wholly irrelevant, what does Tenyo mean?

The Witness: It means something like a blue sky in Japanese.

The Court: Thank you.

Mr. Collins: I am glad you asked that, your Honor. I have also wondered.

Q. (By Mr. Quinn): How long have you been a fisherman, Mr. Cho?

A. Got out of the Navy in '45, and fishing the beginning of '46.

Q. And when did you first acquire the ownership of the Tenyo Maru?

(Testimony of John Y. K. Cho.)

A. In August of 1946.

Q. How did you use the Tenyo Maru after that?

A. I used the Tenyo Maru as a fishing boat, going out for ahi and sword fish, commercial fishing boat.

Q. How long did it go out in a stretch?

A. It would go up to ten to fifteen days in a stretch.

Q. Can you tell the Court approximately what the monthly yield from fishing in the Tenyo Maru was?

A. You mean how much it would bring me a month?

Q. Yes, net. [39]

A. The net would be—four months I made \$3800; that is net on that boat. It is approximately \$900 a month.

Q. And what about the other eight months of the year?

A. The other eight months you make about \$600 a month, because the boat goes out about twice a month, and a share is 35 per cent, bringing just about five hundred, six hundred. Bad months bring in about two hundred.

Q. Do you remember when the Tenyo Maru left on the voyage where she subsequently went on the reef at Molokai?

A. I don't remember the exact date, but it was about the beginning—the ending of March or the beginning of April. I don't quite remember.

(Testimony of John Y. K. Cho.)

Q. She was going on a fishing trip?

A. Yes, sir.

Q. When did you first hear that she had gone on the reef?

A. I heard it Sunday when my sister received a call from Kalani—from the Coast Guard—that my ship was on the reef.

Q. Was that the day that it had gone on the reef?

A. The day after.

Q. The day after?

A. Yes.

Q. And what did you do?

A. I went over to the Young Brothers, and I talked to Mr. Harrison about that, and I talked to Mr. Pavao, the port [40] captain, and at that time Joe Kahiapo dropped in, and he said he was going to Molokai the next morning. So Mr. Pavao and Mr. Harrison—I talked to Mr. Harrison, and Mr. Harrison told Joe to do whatever he can; the same thing Mr. Pavao.

Q. And that was on Sunday?

A. Afternoon.

Q. Afternoon.

A. Yes.

Q. In Honolulu?

A. That's right.

Q. And then what did you do?

A. So I made reservation to catch the next plane to Molokai, got there eight o'clock plane, chartered a plane and flew to Molokai, my brother-in-law and I.

Q. Your brother-in-law and you?

A. Yes.

Q. What did you do when you got there?



(Testimony of John Y. K. Cho.)

A. We made arrangements that Joe would meet me at Kaunakakai Harbor at 2 o'clock that afternoon, Monday afternoon; and we met there, but they couldn't do anything.

Q. Excuse me a minute. You got up there Sunday night?

A. No. Monday morning.

Q. You arrived Monday morning?

A. Yes, sir.

Q. And did you go out to the Tenyo Maru? [41]

A. Yes, I went out to the Tenyo Maru.

Q. That morning?           A. That morning.

Q. What was the condition of the Tenyo Maru when you got there? Describe where it was on the reef and that sort of thing.

A. It was about—it was right on the reef, and it was filled with water from that hole on the side, port side, midship. It was there, and I couldn't get at the leak. I worked on it, put calking on the outside wherever I could reach, and I couldn't get to it from the inside, because it was right below the fuel tank.

Q. Well, will you describe to the Court where the location was from the inside, and describe the situation in the engine room and why you couldn't get down there from the inside.

A. Well, the sampans, they have two fuel tanks on each side of the ship, see, midship, and the leak was on the port side, midship, right on the corner there. That is where a big rock was beating against

(Testimony of John Y. K. Cho.)

it. That is what caused that foot and a half leak there. So the fuel tank on the inside, it was too big, and you have to break up the whole thing to get to it, which was kind of impossible out there, because they didn't have the facility to move anything. And I tried my best to get under there, but the bottom of the tank was something like [42] this (indicating), and the leak was on the inside, you know, between the tank and the side of the ship.

Q. About how much room is there between the bottom corner of the tank and the inside hull of the ship?

A. Well, more or less comes—that is, where the break comes down the side you couldn't get at it because they have got those ribs coming across, and pretty impossible to get there because so small room to work from and all those pipes and the shafts gets in your way.

Q. And why couldn't you calk it from the outside?

A. Couldn't calk it from the outside because the big boulder on the side of it that beat the ship up would cause rocking as soon as the wave come, so I had to dive down and put in some calking and beat it, and the next wave come I would have to pull back; and kept on doing that, whatever I could see.

Q. Did you meet Joe—Who is Joe Kahiapo?

A. Joe Kahiapo is a captain of the Tug Boat Kolo.

Q. Did you meet him at 2 o'clock in Molokai?

(Testimony of John Y. K. Cho.)

A. Yes, I met him at 2 o'clock in Molokai.

Q. What transpired at that time?

A. Well, he said that he had to go—he couldn't do anything now because the tide was low, so he said he was going to Kolo, and I believe he said he was going to pick up a barge or something and then come back that afternoon again. [43]

Q. Monday afternoon? A. Yes.

Q. Go ahead. Did he?

A. And he came back—sort of vague.

The Court: Vague?

Mr. Quinn: He is just trying to recollect.

The Witness: Joe came and went back to Kolo, I believe.

The Court: Kolo; that is the name of the tug.

The Witness: And it is the name of a port. And he said he couldn't pull the boat off because of the tide, and he would pull it off when he comes back; the tide might be up again.

Q. (By Mr. Quinn): And what day would that be? A. That would be the same day.

Q. Monday or Tuesday?

A. Monday. Then what I did was get a water pump—I borrowed a water pump from the City and County of Molokai, and I pumped all the water out, you know, to get it loose, you know, bring the boat up. By the way, I took the pump out with a skiff and pumped the water out, and we had buckets bailing water also.

Q. You were trying to lighten the boat so you might float it off the reef; is that right?

(Testimony of John Y. K. Cho.)

A. That's right. I don't remember what day it was, but the Mahoe——[44]

Q. What is the Mahoe?

A. The Mahoe is a bigger tug boat than the Kolo, owned by Young Brothers. The Kolo tried to pull it off first. It was rigged up but couldn't pull it off. So they had the Mahoe at the front, more or less a double tug, you know, and they finally pulled it off, and the water pump was working up to the time when we got to Kaunakakai Harbor. The men worked on the pump, kept on running it. And I dived down from the side to see whatever patch I could give him, but the hole was below the water line, see, so I couldn't get to it, and the water was dirty, too, from the tug boat tugging in there and stirring up all the harbor water. It is more or less clay water. And that night the pumps was running right through; and I called up Young Brothers the next morning, and Pavao gave me all the prices on the towing, said that the Mahoe would cost \$50 an hour and the Kolo would cost \$35 an hour.

Q. And that night did you talk to Joe Kahiapo at all about how you could repair the Tenyo Maru?

A. Joe knew about the hole there, and he saw me diving under to check the leaks and to check the leak from the inside, and I guess he more or less took it for granted that it was pretty near impossible——

Q. That it was what?

A. That it was pretty near impossible to get at

(Testimony of John Y. K. Cho.)

the hole. I had that big CPC crane lift up my boat, yet couldn't [45] because it was too heavy.

Q. So how did you arrange to have the Tenyo Maru taken under tow from Kaunakakai?

A. Well, I wanted to call Young Brothers. I told Joe, and Joe told me, no, from here on he is taking over; he is more or less taking over responsibility of the towing, see, once he has that line on. So more or less Joe took responsibility on having the boat towed back to Honolulu.

Q. And when did he start to tow?

A. He started to tow—his men rigged up the towing——

Q. This was the day after you had been pulled off the reef?

A. His men put on this barrel, this big 55 gallon drums on the port side of the back and they rigged up 8-inch line, I believe, right around.

Q. Were your fuel tanks full or empty at the time they took the Tenyo Maru under tow?

A. My fuel tanks wasn't quite full, though, because it made that trip and more or less it was about half on both sides.

Q. Did you go on the Tenyo Maru when it was under tow?      A. No, I did not.

Q. Were you there until it left?

A. Yes, I was there until it left.

Q. Did it still have the pump aboard, the gasoline pump, when it was taken under tow? [46]

A. Yes, I had a gasoline pump borrowed from a guy from Molokai.

(Testimony of John Y. K. Cho.)

Q. A different one from the Board of Water Supply pump?

A. Yes, sir. It was a better pump than the Board of Water Supply pump.

Q. More or less capacity?

A. It could take more capacity than the Board of Water Supply pump—was an old pump. As for this pump, it was pretty near brand new pump.

Q. Did the Kolo have a pump on it?

A. Yes, they did.

Q. Did you use the Kolo pump at all to pump out the Tenyo Maru while you were at Kaunakakai?

A. Yes, we tried that pump that night, and the suction of it, the hose they had was not proper for the pump; it would just suck the sides of the hose together.

Q. So that it was unable to draw the water out?

A. Draw the water out.

Q. When you were in Kaunakakai that night, were your pumps able to keep up with the water that was coming through the leak, or not?

A. It was keeping up. That is the reason why we had it up high and dry more or less that next morning. In a few instances we had to even cut off the motor because it was not sucking any water because it was so dry inside. They would only just run the engine, and we had to kill it and prime it again [47] with water to start the engine again.

Q. Did Joe check the rigging and everything before you left the harbor?

(Testimony of John Y. K. Cho.)

A. Yes, he checked everything.

Mr. Quinn: Your witness.

Cross-Examination

By Mr. Collins:

Q. Mr. Cho, you said that you made about \$3800 in four months' fishing; is that right? Was that your gross take?

A. That is my net take.

Q. After paying the crew and all expenses?

A. Yes, sir.

Q. The other figure that you gave of about \$600 a month; is that net also?

A. Yes. That is on the off months like.

Q. I assume that is before taxes. A. No.

Q. After taxes?

A. What do you mean by "taxes"?

Q. I mean, when you say you made \$600 a month, you made that clear; you have paid your expenses, you have paid your taxes, you have paid everything, you have paid your crew and everything else?

A. Yes, after taking out supplies and everything.

Q. Did you ever go out on the ship at all, on these [48] fishing trips? A. Yes, sir.

Q. But you did not go out on this particular trip where she went aground? A. That's right.

Q. You did not? A. I did not go.

Q. Now, you say you first heard that she went on the reef on Sunday or on Monday?

A. On Sunday.

(Testimony of John Y. K. Cho.)

Q. Would you tell us again what you did on that Sunday?

A. On that Sunday I don't know what I did. You mean where I went that Sunday?

Q. Yes, what you did in connection with your sampan that was on the reef.

A. Well, my sister called me up. She said that the Coast Guard called her and told her that the sampan was aground at Molokai, so I went down—and the Coast Guard said they couldn't pull it off because there was no life and danger, and it didn't have navigation and we would have to hire a salvage company. So I went down to Young Brothers. I believe before that my sister called Mr. Harrison, or I did, I don't remember. Then I went down to the Young Brothers and talked to Captain Pavao and Mr. Harrison over the 'phone, and they said Joe Kahiapo was going to Molokai the next morning. [49]

Q. Yes.

A. And they said that have Joe to do whatever he can for the boat. And I made arrangements to meet him there at 2 o'clock the next day.

Q. Now, this discussion that you had with Mr. Harrison and Mr. Pavao, where was this discussion held?

A. I believe Mr. Harrison was at home, because it was on Sunday that we called him up.

Q. Did you talk to Mr. Harrison?

A. Yes, I did.



(Testimony of John Y. K. Cho.)

Q. At his home?

A. At his home, by 'phone, I believe.

Q. You telephoned him? A. That's right.

Q. What time of day was that?

A. I believe it was about in the late afternoon. I don't quite remember.

Q. You say that was around five o'clock?

A. Before five.

Q. Between four and five?

A. Well, just about there, between three and four, I believe.

Q. And what did you say to Mr. Harrison?

A. I don't quite remember. I know something like I told him that my boat was on the reef down in Molokai. Most [50] of the discussion I had with Captain Pavao saying that Joe was going down.

Q. Did you speak to Mr. Harrison about Young Brothers tug's helping you? A. Yes, sir.

Q. What did you say?

A. I don't quite remember what I said.

Q. Well, in substance, what did you say?

A. In other words, to help me get my boat off the reef.

Q. Did you ask him to have a Young Brothers tug assist you? A. That's right.

Q. What did he say?

A. He said that he would because the Kolo was going there the next morning.

Q. Was there any discussion of price?

A. The discussion of price came when the boat was in Molokai.

(Testimony of John Y. K. Cho.)

Q. On this particular afternoon, in this telephone conversation that you speak of, was there any discussion of price?

A. No, no discussion of price but——

Q. Was there any discussion of gear? Did he ask you any questions as to what gear the sampan had aboard?

A. What gear?

Q. Yes, towing gear. [51]

A. Well, that afternoon, even I——

Q. In this telephone conversation with Mr. Harrison was there any discussion about the towing gear that the sampan had?

A. The sampan didn't have any towing gear.

Q. Was there any discussion with Mr. Harrison about it?

A. No, there was not.

Q. Was there any discussion on the condition of the sampan?

A. Oh, we knew that it was on the reef at that time, but we didn't know the extent of the damage.

Q. Was there any discussion with Mr. Harrison about what condition the sampan was in on the reef?

A. I don't remember.

Q. Was there any discussion about a tow to Honolulu?

A. I don't know.

Q. When you asked for assistance, did you ask for assistance from the reef to the pier, or did you ask for assistance to have the sampan brought to Honolulu?

A. Assistance to salvage the boat.

Q. Was there any discussion about Honolulu?

(Testimony of John Y. K. Cho.)

A. There was most likely, but they had to bring it to Honolulu.

Q. Did you ask him about towage to Honolulu?

A. That point didn't come out. We just said to salvage [52] the boat for us.

Q. Did you ask him that the sampan be taken off the reef and brought into Kaunakakai?

A. The discussion was, we just wanted the sampan to be salvaged.

Q. But you didn't say anything about where it was to be taken after it was taken off the reef?

A. It most likely would have to go into Kaunakakai first anyway.

Q. I am talking about this conversation you say you had on the telephone with Mr. Harrison. Was there any discussion as to whether the sampan, after it was taken off the reef, would be taken to Kaunakakai, to Kolo, or Honolulu, or anyplace else?

A. I guess it would be taken to Kaunakakai.

Q. Was there any discussion in that conversation about its being thereafter towed to Honolulu?

A. There was no discussion. The discussion was not that long.

Q. You never mentioned to Mr. Harrison in this conversation that you wished the sampan to be towed to Honolulu?      A. That's right.

Mr. Quinn: I object, if the Court please. I didn't realize this was going on this long. I object to the question now before the Court and the entire series of questions as being [53] immaterial.

(Testimony of John Y. K. Cho.)

Mr. Collins: On the contrary, your Honor, we consider this the very essence of the case. The question is as to the responsibility of Young Brothers, and it seems to me that any conversation that was had with Young Brothers' representative in connection with any of this work that was done is very material.

Mr. Quinn: If I may be heard, if the Court please. That is the error into which I think Respondent has fallen. He says the question is the responsibility of Young Brothers. It is no such thing. Young Brothers may possibly be a Claimant, but the question is the responsibility of the Tug Kolo, and so long as a person who is in possession of the Tug Kolo, and that is the only requirement, commits a maritime tort, the Tug Kolo is responsible. We are not interested in Young Brothers. We are interested in the Tug Kolo, and not Mr. Harrison or Young Brothers.

The Court: On the other hand, might it not well be that the contract, if any, which Young Brothers made for the Kolo might have a good deal of bearing on the situation.

I take it that he is leading up to a situation where he might agree with you and say, Nevertheless, Young Brothers made a contract for the Kolo, which would have some significance or relevancy here.

Mr. Quinn: I am not sure I get the drift, if the Court [54] please. If you mean a contract whereby—

(Testimony of John Y. K. Cho.)

The Court: —the ship was bound, the Kolo.

Mr. Quinn: Well, even assuming the ship was bound to take it only to Kaunakakai, the ship did, in fact, take it to Honolulu; unless he means a contract on the part of the Tenyo Maru not to assert its rights under the maritime law as some sort of a limitation of liability for tort, then that has not even had a glimmer in this entire examination or in the pleadings. If there is a contract of some sort limiting liability I take it should have been in the Answer. But if it is a question entirely of whether Young Brothers authorized or did not authorize, which I take it is the point that is sought to be brought out one way or the other here, I suggest that as a matter of law it is completely immaterial to this action.

The Court: I understand your point, but at the moment I don't know enough about it and the admiralty law, very frankly, to rule squarely on it, so I am going to overrule your objection, and since that is the basic question, we can get to the facts when we have all the facts on it. But you may have an exception.

Mr. Quinn: Thank you, your Honor.

The Court: And it will run to this line. But, actually, while we have a stopping point here, as I understand this witness, so far he has simply told us that in this telephone conversation with Mr. Harrison here in Honolulu on that [55] particular Sunday before he, the witness, went over to Molo-

(Testimony of John Y. K. Cho.)

kai, that the talk between himself and Harrison was simply with respect to salvaging the Tenyo Maru from its plight, purportedly, the Maru being on a reef in Molokai. But there was no discussion with Mr. Harrison I have yet heard as to where the ship Maru was to be taken once it was pulled off the reef; is that right?

The Witness: Yes.

Mr. Collins: May I have the last question.

(Question and Answer read by the Reporter as follows:)

“Q. You never mentioned to Mr. Harrison in this conversation that you wished the sampan to be towed to Honolulu?

“A. That’s right.”

Q. (By Mr. Collins): Now, this discussion you had with Mr. Pavao, where did that take place?

A. It took place in the Young Brothers’ office.

Q. And about what time in the afternoon was that?

A. That is the same time when——

Q. Was it before or after the telephone call?

A. Mr. Pavao was there when I called Mr. Harrison.

Q. Well, now, will you tell us what the discussion was with Mr. Pavao.

Mr. Quinn: I object. Same objection.

The Court: Same ruling.

Mr. Quinn: I object to this, I think, on another ground; [56] subject to an identification of Mr. Pavao, it is hearsay.

(Testimony of John Y. K. Cho.)

The Court: I would like to know who he is.

Q. (By Mr. Collins): Do you know who Mr. Pavao is? A. Yes, sir.

Q. Would you tell the Court who he is?

A. He is the port captain for the Young Brothers.

Mr. Quinn: What?

The Witness: He was the port captain for the Young Brothers.

The Court: That is admitted? You agree?

Mr. Collins: Yes. I have been advised that he was at that time.

The Court: All right.

Q. (By Mr. Collins): Now, what was the substance of the discussion you had with Mr. Pavao?

A. To help me salvage the boat.

Q. Was there any mention made of Honolulu at that time?

A. Well, it was more or less taken for granted to bring my boat back.

Q. Did you ask him that Young Brothers should bring your boat to Honolulu?

A. The main subject was that I wanted my boat to be salvaged.

Q. But you did not mention Honolulu? [57]

A. It didn't come up.

Q. Was there any discussion with respect to the price of the salvage operation?

A. The salvage operation, the price was discussed before the boat was pulled off the reef.

(Testimony of John Y. K. Cho.)

Q. No; in this particular conversation on this Sunday afternoon?

A. He couldn't tell what the price would be. He couldn't tell because he didn't know what the extent of damage was there, so he told Joe to do whatever he can.

The Court: "So he told Joe to do whatever he can"; the last I knew you were talking to Mr. Pavao. It strikes me you are now calling somebody else.

The Witness: Joe, because Joe was in the office at the same time Mr. Pavao was in the office.

The Court: At this conversation with Mr. Pavao that you just described a new person was present, namely, Joe?

The Witness: Joe Kahiapo.

Q. (By Mr. Collins): Who is Joe?

A. Joe Kahiapo is the captain of the Kolo.

Q. Was there any discussion as to the condition of the sampan?

A. There wasn't because we didn't know the extent of damage on that boat. All we knew was it was on the reef in Molokai. [58]

Q. Mr. Pavao did not ask you anything about its condition?

A. No. We just told him that the boat was on the reef and we wanted our boat to be salvaged.

Q. I take it your answer is, he did not ask about the condition of the sampan.

A. I don't believe he did.



(Testimony of John Y. K. Cho.)

The Court: Just for clarity, a moment ago you said "we." Was there someone with you, or does that "we" mean Pavao, Joe and yourself?

The Witness: We?

The Court: You said "We asked for salvage." Did someone go with you?

The Witness: Yes, my sister.

The Court: Your sister was there at this conversation which you had with Mr. Pavao and Joe?

The Witness: Yes, sir.

Q. (By Mr. Collins): What did Mr. Pavao say about the Young Brothers tug being used in this operation?

A. Well, that day the only arrangements made was that I wanted my boat to be salvaged. We didn't know the extent of damage or how far in that sampan was, and Joe was going to Kaunakakai that afternoon, and we made arrangements to meet there, and he told him to do whatever he could.

Q. You made those arrangements with Joe at this conference [59] at which your sister was present and Mr. Pavao was present?

A. That's right.

Q. Did you have any other conference with Joe prior to your leaving here?      A. No, sir.

Q. That is the only one?

A. That's right, to meet at Kaunakakai Harbor at 2 o'clock.

Q. And you say that Mr. Pavao, as a result of

(Testimony of John Y. K. Cho.)

this discussion, arranged to have Joe go down to help you?      A. That's right.

Q. How did you happen to call Mr. Harrison?

A. Because Mr. Harrison is head of the Young Brothers, or vice president of the Young Brothers.

Q. Well, if everything was being worked out with Mr. Pavao, the port captain, why did you bother calling Mr. Harrison?

A. Well, my sister called him when we were at home, I believe, and they told her to call Mr. Harrison to make arrangements, but when we went down to the Young Brothers' office, I guess Mr. Pavao went over to ask Mr. Harrison, too.

Q. It was Mr. Pavao that made the telephone call, and not you?

A. I made the telephone call, but Mr. Pavao must have talked to Mr. Harrison.

Q. Did Mr. Pavao ask you to make the telephone call? [60]

A. No, I did.

Q. Well, again, if everything is being worked out here, all the arrangements are being made for this salvage operation, why did you bother calling Mr. Harrison?

A. Because Mr. Harrison is the head of the place, and I guess they didn't know the price of salvage.

Q. But you say there wasn't any discussion on price.

A. There wasn't any discussion, but yet they

(Testimony of John Y. K. Cho.)

had to tell Mr. Harrison, I believe—I don't know; that seems vague, that——

Q. In other words, you called Mr. Harrison——

Mr. Quinn: I object and ask that the witness be allowed to answer and explain, if the Court please.

The Witness: I can not——

The Court: He had not quite finished. Go ahead.

The Witness: Because I can not tell you exactly word for word what I discussed with Mr. Harrison at that time, because I just wanted my boat to be salvaged. I don't know what I talked to Mr. Harrison or Mr. Pavao word for word because that was a year ago.

Q. (By Mr. Collins): But you say that you think it might have been for the reason of price, although price wasn't discussed in this meeting?

A. I don't remember.

Q. But you do remember that you made the telephone call? A. Yes, I think I did. [61]

Q. During this conference? A. Yes.

Q. And that Mr. Harrison said that he would arrange to have the Young Brothers tug salvage your sampan?

A. Something like that. I think that afternoon—I think Mr. Harrison knew that Joe was going down to Kaunakakai that afternoon, so——

Q. Was Joe supposed to leave on Sunday afternoon?

A. I don't know when, but I believe it was the next morning when he left. Anyway, the arrange-

(Testimony of John Y. K. Cho.)

ment was to meet at Kaunakakai at 2 o'clock.

Q. Are you sure that this telephone conversation with Mr. Harrison didn't take place on Monday?

A. It couldn't have taken place on Monday.

Q. It could have? A. It couldn't.

Q. Could or could not?

A. It could not have.

Q. And you say this conference was held in Mr. Pavao's office?

A. I don't know whose office that was.

Q. Was it in an office at Young Brothers?

A. That's right.

Q. And your only discussion with Joe was at that conference prior to your going to Molokai and meeting him there? [62] A. That's right.

Q. Now, when did you arrive at Molokai?

A. I arrived Monday morning.

Q. You didn't leave that afternoon?

A. No.

Q. What did you do after you arrived there?

A. I went down to the boat to see what extent of damage there was and to see whatever I could to help bring that boat out.

Q. You went out to the boat on the reef?

A. That's right.

Q. Were there any pumps going at the time?

A. It wasn't necessary to run any pumps at that time. It was steadfast on the reef.

Q. Your answer is, There were no pumps going; is that right?

(Testimony of John Y. K. Cho.)

A. That's right. It wasn't necessary to have any pumps going at that time.

Q. Now, did you make arrangements to secure a pump from the Board of Water Supply?

A. Yes.

Q. Didn't you put that pump out on the boat?

A. I did, but——

Q. And didn't you operate—Go ahead.

A. Your question was what I did to the boat when I first [63] got there, so I said I went down there to see what I could do.

Q. Yes.

A. And the reason why I borrowed the water pump was, since the Young Brothers was going to try to pull it out, to lessen the weight on that boat.

Q. Well, will you tell us what you meant when you said it was not necessary to have pumps going?

A. It wasn't necessary to have pumps going at that time because the boat was steadfast, and on that place it would be nothing to keep running that pump all the time, because the water would come up to a certain level, and that is about all.

Q. And you say that Joe arrived there that afternoon?

A. Yes, sir.

Q. That was Monday afternoon?

A. Yes, sir.

Q. Did you have any discussion with him?

A. He said that the tide was low, so he couldn't do anything then, so he was going back to Kolo, and I believe he say he will be back that afternoon and try to see what he could do to it.

(Testimony of John Y. K. Cho.)

Q. How long have you known Joe?

A. Since the time at the Young Brothers.

Q. You didn't know him before that?

A. No, sir.

Q. Did you stay aboard the ship that night? [64]

A. You mean on the Tenyo Maru?

Q. Yes.

A. I had my crew on board the ship that night.

Q. Did you stay on board? A. No, sir.

Q. When did you start the first pump going then?

A. I believe—I don't remember quite whether it was during that afternoon of the conversation with Joe——

Q. Well, let me ask you this: Joe was going to try to pull you off that afternoon, wasn't he?

A. If the tide was right.

Q. Did you arrange to have the pump put aboard before he started working on the tow?

A. That's right.

Q. You did. Did you keep the pump going all night? A. Well, on the reef?

Q. Yes.

A. No, sir, because if I had kept the pump going all night, the pump would lessen the weight of the boat and the boat liable to go further in, because where it was, it should be right there. If I lessen the boat, the waves would shove it further in and it would be worse.

Q. Were you working the pump when Joe was trying to pull it off?

(Testimony of John Y. K. Cho.)

A. Yes, the pump was working, and before Joe pulled us [65] off, during the time we made arrangements for the bridle to go on to pull us off, I had to lessen it and it would take time to get the water out of that boat.

The Court: Excuse me. Am I correct in understanding that the Tenyo Maru was pulled off the reef on Monday and went to the pier at Kaunakakai?

Mr. Collins: No, that is not quite correct, your Honor. An attempt was made on Monday afternoon by a small tug, unsuccessfully, and the operations were conducted on the next day. I believe that is correct.

The Court: Thank you.

The Witness: Excuse me. Mr. Quinn, what day was that? I don't remember the date the tug boat was pulled off the reef—I mean, which is the date? Was it on the 7th or the 6th?

Mr. Quinn: That is stipulated, your Honor. I think I can tell the witness that.

Mr. Collins: Yes.

Mr. Quinn: It was the 7th.

Mr. Collins: That is Wednesday, your Honor.

The Court: Monday and Tuesday were utilized in trying to get——

Mr. Collins: No, I am incorrect.

Mr. Quinn: Pulled off on the 6th and entered on the journey on the 7th. [66]

(Testimony of John Y. K. Cho.)

The Witness: There was just one attempt to pull it off.

Mr. Collins: Started Monday afternoon unsuccessfully, carried on Tuesday successfully, and brought into the pier; and the next day it started for Honolulu.

Mr. Quinn: Admitted allegations, paragraphs 3 and 4 of the Petition, state that on Saturday—Libellant was unable to engage a tug to salvage the Tenyo Maru until Tuesday, April 6, when the Kolo and the Mahoe towed the Tenyo Maru off the reef, and during the night of April 6, the Tenyo Maru remained at Kaunakakai, and about noon, April 7, she started on her journey to Honolulu.

The Court: Thank you.

Q. (By Mr. Collins): Well, am I correct in assuming that after the towing operations were unsuccessful on Monday afternoon you stopped pumping?

A. On Monday afternoon we didn't pump no water, and we didn't make no attempt because the only thing Joe said the tide was not high enough, on Monday, so on Tuesday the real attempt was made on that boat.

Q. Well, on Monday was a line actually put over to the sampan? Did they attempt to tow you off on Monday? A. No, sir.

Q. No attempt was made at all?

A. No, sir.

Q. And you say Joe said he was going to Kolo?

A. Yes.



(Testimony of John Y. K. Cho.)

Q. When did he leave Kaunakakai?

A. As soon as he got there, he left there for Kolo.

Q. You mean after he looked over the situation?

A. Well, he looked at the boat where it was situated, and after that he said he would be back, and he left because the tide was low.

Q. When did Joe return to Kaunakakai?

A. I don't know if it was that afternoon or the next morning.

Q. Did any other Young Brothers tug come in there? A. Yes, the Mahoe the next morning.

Q. Do you recall when the Mahoe came in?

A. Beg pardon?

Q. Do you recall when the Mahoe came into the Kaunakakai Harbor?

A. I think it was Sunday—No, Tuesday morning.

Q. Was that before or after Joe came in?

A. Came—I mean Joe came to Kaunakakai before the Mahoe.

The Court: But he left again to go to Kolo?

The Witness: Yes, but I don't remember when that boat—which one came in first, though. I believe that both of them came in together maybe.

Q. (By Mr. Collins): Well, sometime on Tuesday morning the Mahoe came in and Joe came in on the Kolo before that; is [68] that correct?

The Court: No, you are confused. He thought

(Testimony of John Y. K. Cho.)

you meant when they first arrived. In other words, he is trying to make it clear to you that the Kolo first arrived at Kaunakakai.

Mr. Collins: That is on Monday.

The Court: He isn't taking into consideration in this question of yours that trip to Kolo. When I asked him, he said he thought they both possibly came back and re-entered——

Mr. Collins: Suppose we try to clarify that.

Q. (By Mr. Collins): Joe left, you say, on Monday afternoon after he looked the scene over and said that the tide was too high? A. Too low.

Q. I am sorry. The tide was too low. Then Joe came back to Kaunakakai, did he?

A. Yes, sir.

Q. When did he come back?

A. If I am not mistaken, I think the Kolo and the Mahoe came in together from Kolo the next morning.

Q. Do you recall about what time that was?

A. I don't.

Q. Well, was it early morning?

A. Oh, it was in the morning.

Q. Early morning. Well, now did you have any discussion [69] with Joe in connection with this salvage operation on Tuesday?

A. He didn't know the rates on them, so I called Young Brothers that morning.

Q. You called Young Brothers on Tuesday morning?

(Testimony of John Y. K. Cho.)

A. Tuesday morning, talked to Pavao, and he gave me the rates on the tug boats; the big one would be fifty and the small tug would be \$35.

Q. Did you put in this call before or after the tugs came in?

A. During the time the tug was in.

Q. It was after the tugs came in to Kaunakakai; is that right?      A. That's right.

Q. Could you give us any idea as to what time in the morning you put that call in?      A. No.

Q. You cannot?

A. I cannot recall. I know it was in the morning, though.

Q. In this telephone conversation with Mr. Pavao, was there any mention made of towage to Honolulu?

A. That's right. He gave me the prices on them.

Q. Did you ask him the rates for towage to Honolulu?      A. For salvaging.

Q. Was there any discussion about Honolulu?

A. Well, I wanted my boat salvaged, and he said the rates on the tugs were \$35 and \$50.

Q. Was there any mention made of Honolulu?

A. I don't remember.

Q. Did you have any discussion with the captain of the Mahoe?

A. Well, we talked, but I don't know what we talked about.

Q. Did you talk about the salvage operation?

A. Salvage operation, but talked to Joe on that.

(Testimony of John Y. K. Cho.)

Q. But you do recall having a conversation with the captain of the Mahoe? A. Yes.

Q. When did the salvage operation start?

A. In what way? When the Young Brothers started pulling or when——

Q. Yes, when did they start putting their lines on and pulling it?

A. Their lines were rigged over our boat, and that was about 4 o'clock, I believe.

Q. About four?

A. Four thirty, like that.

The Court: A.M. or P.M.?

The Witness: P.M.

The Court: Four thirty p.m. Tuesday afternoon? [71]

The Witness: That's right.

The Court: You mean you had been talking from morning until 4:30 p.m.?

The Witness: It was because of the tide. The tide was high about then.

Q. (By Mr. Collins): Do you have any bits on the sampan?

The Court: What?

Mr. Collins: Bits.

The Witness: Bits?

Q. (By Mr. Collins): Yes.

Mr. Quinn: Brace and bit?

Mr. Collins: Strike that.

Q. (By Mr. Collins): How did they rig up the lines to pull the sampan off?

(Testimony of John Y. K. Cho.)

A. Threw a bridle over, more or less, I mean a rope in the center, you know, a big rope like that right around the boat.

Q. All the way around?

A. That's right. Then we put small ropes to hold that rope in place over the boat.

Q. That would seem to be rather a complicated operation. Did that take very long?

A. Well, we did that during that time. They told us to rig it up.

Q. Did you rig it up? [72]

A. Yes, to save money.

Q. Was the captain of the Mahoe on board the sampan at the time——

Mr. Quinn: I object, your Honor. Even though your Honor has ruled on my prior objection with respect to relevance or materiality, I strongly object that any actions of the captain of the Mahoe have nothing to do whatsoever with this unless it is further shown, in connection with this other immaterial ground, that the captain of the Mahoe is the senior agent away from Young Brothers, or something akin to that.

The Court: That is an angle I didn't catch in this question. Will you read the question?

(Question read.)

The Court: What is your position with respect to this objection?

Mr. Collins: Well, our position is, first of all, your Honor, if I might make a statement, the

(Testimony of John Y. K. Cho.)

captain of the Mahoe is the senior tug boat captain, or was at that time, in the port, something that we will subsequently bring out; but the principal thing that we are endeavoring to do is to show that there was absolutely no authority, no relationship between this towage between Kaunakakai and Honolulu, absolutely no relationship between that towage job and Young Brothers as such. Counsel for the Libellant seems to feel that is entirely immaterial, which is something with which we disagree violently, [74] and we wish to get the picture clear on that point.

The Court: I think I understand the difference between the two of you on that score, but in the painting of this picture, as I understand it, we still have the Tenyo Maru on the reef.

Mr. Collins: We do.

The Court: And this man, the owner, has said that he and his ship's crew prepared the sampan in terms of rigging in order to save money, so that the tug boat could come along and pull it off the reef. Let's get the thing off the reef to the pier before we start this trip to Honolulu. And your question, as I understand it, relates to that situation and asks this witness whether or not, when the sampan was still on the reef, before, while, or after he and his men had prepared the sampan for towage, the captain of the Mahoe came aboard the sampan.

Mr. Collins: Yes. We will withdraw the question, your Honor.

(Testimony of John Y. K. Cho.)

The Court: All right. And let me, while we have an interruption, make sure I am right. You did this preparing of your ship, or your boat, this rigging business that you talked about, while it was on the reef?

The Witness: That is right.

Q. (By Mr. Collins): Was that the same rigging that was used in the tow to Honolulu? [75]

A. No, sir.

Q. Now, you told us with both tugs towing the sampan was pulled off? A. That's right.

Q. And she was brought into the harbor at Kaunakakai? A. Yes, sir.

Q. Were your pumps going at the time?

A. Yes, sir.

Q. You had the Board of Water Supply pump on board at that time? A. Yes, sir.

Q. And you had the gas pump on board?

A. The Board of Water Supply is the gas pump.

Q. Weren't there two pumps?

A. The Board of Water Supply pump was returned and then a new pump was brought in the picture.

Q. Well, in the trip in to Kaunakakai you had the gas pump on board? A. That's right.

Q. With the men operating the hand pump also?

A. Yes, sir.

Q. About what time was she tied up?

A. She was tied up about a quarter to five, I believe. It didn't take long.

(Testimony of John Y. K. Cho.)

Q. Did you have any discussion with the captain of the [76] Mahoe after the sampan was tied up?

A. Yes, he told me to call Honolulu if I wanted the boat to be towed home. Then I told Joe that, after he put the lines on, and he said from here he was taking authority.

Mr. Quinn: May I have that read?

(Answer read.)

Q. (By Mr. Collins): Did you thereafter call Honolulu before the trip to Honolulu started?

A. No, I did not, because Joe took the authority. He was the captain of the ship. It is understood that the captain does what he wants.

Q. Did you stay on board the sampan that night?

A. No, I did not. I went down there and worked on the boat and I came back—I went back again to check all the time.

Q. You say that the hole in the bottom was in a rather inaccessible place; it was hard to get at?

A. That's right.

Q. Did you make any attempt to get at it?

A. Yes, sir. Even had the CPC crane try to get at it. They lift the boat up.

Q. You found that you couldn't patch it up from inside? A. No, sir.

Q. About how much water was in the sampan when she first came into the pier there?

A. Pumps working. There was not too much



(Testimony of John Y. K. Cho.)

water in it; [77] about a foot, a foot and a half, or a little more.

Q. And the gas pump was being operated, and the hand pump was being operated; is that right?

A. Just the gas pump.

Q. Now, you say you did not stay on board that night. How late were you there with it?

A. What was that again?

Q. You didn't stay with the boat all night long?

A. I didn't stay continuous. I came over to check, help with the pumps. And that night tried Young Brothers tug boat pump on it, too.

Q. Were you there off and on all night?

A. That's right.

Q. When you looked at it in the morning, how much water was there in it?      A. It was dry.

Q. It was dry?      A. That's right.

The Court: Excuse me; let's get this straightened out. At what point of time did you "swap" gasoline pumps by returning this City pump and getting the new pump?

The Witness: It was about nine o'clock, I believe.

The Court: Tuesday night?

The Witness: Wednesday.

Q. (By Mr. Collins): Didn't I understand correctly that [78] you "swapped" the Board of Water Supply pump before the sampan was actually towed off the reef?

A. No; the Board of Water Supply pump was on the boat all night.

(Testimony of John Y. K. Cho.)

Q. And you got the gasoline pump that night?

A. The two of them was gasoline pumps.

Q. The second pump——

A. The second pump was the next morning.

The Court: Let's review that again, since we are all confused.

I understand there was a hand pump aboard the sampan at all times.

The Witness: We have got three hand pumps.

The Court: Well, we had only heard of one before. After you went to Molokai, and while your vessel was still on the reef, I understand you borrowed from the City and County or from the Board of Water Supply a gasoline pump.

The Witness: That is right.

The Court: And aboard a skiff took it out to your sampan on the reef.

The Witness: That's right.

The Court: And that gasoline pump stayed on your sampan during the time it was pulled off the reef and to the pier.

Now, when was that City and County property, this gas pump, [79] taken off your boat?

The Witness: The City and County gas pump was taken off the boat as soon as I got the other pump.

The Court: Between the getting of the second gasoline——

The Witness: We got the second pump and then we returned the first one. There wasn't no break in between.

(Testimony of John Y. K. Cho.)

The Court: All right, and you got the second gasoline pump on Wednesday morning?

The Witness: That's right.

The Court: At which time you returned the County property?

The Witness: That's right.

The Court: Or Board of Water Supply property?

The Witness: That's right.

The Court: At the time you tell us that the Young Brothers gasoline pump aboard the Kolo was tried on your sampan——

The Witness: That was tried in the morning.

The Court: On Wednesday?

The Witness: Wednesday.

The Court: Then at that time there were two pumps working on that sampan?

The Witness: But the Kolo pump couldn't pump the water.

The Court: But there were two; one was working and one couldn't work? [80]

A. Yes.

Q. (By Mr. Collins): Well, when you said that the sampan was dry in the morning, about what time in the morning was that?

A. I stayed there all morning after that.

Q. It was dry all morning?

A. Well, I can't say dry, but there was water in it and at times we had to kill the motor to rest the motor——

(Testimony of John Y. K. Cho.)

Q. Well, at the time you put the second pump—so we can distinguish that from the Board of Water Supply pump—at the time you put the second pump on board, was she dry then?

A. The second pump; yes, she was dry.

Q. And then, if I understand correctly, you just ran that second pump during the balance of the morning off and on?

A. Off and on, because the pump was better than the Board of Water Supply pump. It was a bigger capacity pump.

Q. The hand pumps weren't operated at all that morning?

A. It wasn't necessary. You see, the reason why we have all those hand pumps on that boat is because water is always in that boat when we have ice in it, and the ice melts in that boat, so we get that pump and pump the water out. That is the reason for the hand pump.

Q. You say that you attempted to calk it from the outside?

The Court: At the pier? [S1]

Q. (By Mr. Collins): At the pier. Did I understand you correctly?

A. I tried to calk it, and I put some calk in it on the reef.

Q. On the reef; but you did not at the pier?

A. At the pier I tried, because I couldn't get at it. The water was dirty and I had to dive. It was below the water line.

(Testimony of John Y. K. Cho.)

Q. Were you at the dock at the time that the tow started, they started pulling out of Kaunakakai for Honolulu? A. Yes, sir.

Q. You were on the sampan immediately before it started being towed out. Did you give it a final look-over before the tow started?

A. Well, what do you mean by "final look-over"?

Q. Well, I assume that during the morning you were on board to see how the pump was working, to see if something couldn't be done to patch it up; and I assume that you were on and off the sampan during the morning, weren't you?

A. Yes, sir.

Q. And just before she started being pulled out for Honloulu, you looked it over again, didn't you?

A. It is understood I looked at it.

Q. How much water was in there the last time you saw it?

A. When she started out, the water was not much in there. [82] She was riding high.

Q. About how much water would you say was in it?

A. Say it is less than a foot, though.

Q. Was the pump working at that time?

A. Yes, the pump was working. Sometimes they had to cut it off.

Q. At the time the tow started for Honolulu, you had three men on board; is that correct?

A. Yes, sir.

(Testimony of John Y. K. Cho.)

Q. That was the regular crew?

A. Yes, sir.

Q. Did you have any discussion with Joe about signal arrangements between the tug and the sampan during the trip?

A. What sort of signal arrangement?

Q. Well, any system of signaling whereby the tug could know what the condition was on the sampan?

A. No, sir.

Q. No discussion of that at all?

A. No, sir.

Q. Did you give any instructions to your crew about that, about how they should notify the tug if anything should happen to go wrong?

A. No, sir.

Q. You did not?

Mr. Collins: That is all, your Honor. [83]

The Court: Redirect?

Mr. Quinn: When you cut off the pumps at the pier, did the water come in?

The Witness: Yes, it came in.

Mr. Quinn: I have no further questions.

The Court: You are excused.

(Witness excused.)

The Court: Do you have another witness?

Mr. Quinn: Yes, your Honor.

The Court: What is your pleasure? Do you want to operate until one o'clock and then have the afternoon free, or do you wish to have an afternoon session? It doesn't make a bit of difference to me.

Mr. Collins: If your Honor please, I think we would prefer to have as much time in as possible to wind up the case as quickly as possible.

Mr. Quinn: That is our feeling also.

The Court: We will take our recess at noon and return at 1:15.

Mr. Collins: Recess at noon?

The Court: Recess at noon, and then what time do you want to start?

Mr. Collins: One o'clock.

Mr. Quinn: One-thirty, your Honor.

The Court: One-thirty? [84]

Mr. Collins: That will be fine.

The Court: All right.

## JOSEPH W. KAHIAPO

being called as a witness on behalf of the Libellant, and being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name?

The Witness: Joseph W. Kahiapo.

The Court: That is?

The Witness (Spelling): K-a-h-i-a-p-o.

The Court: How old are you?

The Witness: Twenty-eight years old.

The Court: Do you live in Honolulu?

The Witness: Yes, sir, 45 Neiera Lane.

The Court: And are you employed?

The Witness: Yes, sir.

The Court: By?

The Witness: By Commercial Development.

(Testimony of Joseph W. Kahiapo.)

The Court: And the nature of your occupation is what?

The Witness: Welder burner.

The Court: Welder burner?

The Witness: Yes, sir.

The Court: And you are a citizen of the United States?

The Witness: Yes, your Honor.

The Court: Take the witness. [85]

### Direct Examination

By Mr. Quinn:

Q. Mr. Kahiapo——

The Court: I forgot to ask him “only”; citizen of the United States only?

The Witness: Yes, your Honor.

Q. (By Mr. Quinn): Mr. Kahiapo, where were you employed last year, April?

A. Before April 16 I was working for Young Brothers, Ltd.

Q. How long had you been with Young Brothers?  
A. Since February of 1944.

Q. And what was your job at Young Brothers last year?  
A. Tug operator and launchman.

Q. Tug operator and what?

A. Launchman.

Q. Launchman? A. Yes.

Q. And with what tug did you operate?

A. Well, I was working with the boat house at that time, and we usually alternate to run any of the



(Testimony of Joseph W. Kahiapo.)

tugs connected with the boat house and handling harbor duties and off shore.

The Court: You talk fast and very soft, and they can't hear you down there, so will you go over that again and speak slower and more distinctly.

The Witness: Well, I was with the boat house at that [86] time, and we run all the tugs connected with the boat house, all the tugs, they handled harbor job and off shore pilot job.

Q. (By Mr. Quinn): Are you qualified to act as master of a tug?

A. Under sixty-five feet?

Q. Under sixty-five feet? A. Yes.

Q. Were you acting as a master of a tug?

A. Tug Kolo at that time.

Q. The Tug Kolo. Do you know John Cho?

A. At the incident, yes.

Q. When did you first meet him?

A. That was, I think, April 5 of last year.

Q. And under what circumstances did you meet Mr. Cho?

A. Well, it was through an introduction from the port captain, assistant port captain—no, the port captain at that time, I think.

Q. What is his name? A. Hop O'Neill.

Q. What? A. Mr. O'Neill.

Q. O'Neill? A. Yes.

Q. And you say that was on April 5? [87]

A. That was the Sunday before the thing happened. I think it was April 5.

(Testimony of Joseph W. Kahiapo.)

Mr. Quinn: As a matter of fact, I think we stipulated it was April 4.

Mr. Collins: Sunday was the 4th. We will so stipulate.

The Court: All right.

Q. (By Mr. Quinn): When you met Mr. Cho, who else was there besides Mr. O'Neill?

A. Just the three of us.

Q. What was the purpose of that get-together—where did you meet Mr. Cho?

A. That was in the dispatch office, below the main office at Young Brothers, Pier 21, and we were consulting something about Johnny came there to see if he could get any assistance or something to have his tug salvaged from the reef at Molokai, and Hop O'Neill—well, the conversation was about, I believe that Hop O'Neill told Johnny I was going up there, and they came to see me if I can do anything about it.

I told them there was nothing for me to do but see the port captain or manager in the morning and he would give me the orders to go there to salvage the job. In other words, I couldn't right there accept the job without authority from the manager of the Company or the port captain.

Q. So then did you receive any—— [88]

Mr. Quinn: Strike that, please.

Q. (By Mr. Quinn): When was the next time you saw John Cho?

A. I met him, that was Wednesday following that, at Kaunakakai Harbor.

(Testimony of Joseph W. Kahiapo.)

Q. Wednesday following?

A. Yes, Wednesday following that Sunday.

Mr. Quinn: May I have your permission to read certain admitted stipulated facts to the witness?

Mr. Collins: No objection.

Mr. Quinn: These are the facts of date, and so forth, Mr. Kahiapo, so that you can orient yourself.

The Tenyo Maru went aground on Saturday, April 3. The Tenyo Maru was towed off the reef by the Kolo and the Mahoe on April 6.

The Witness: That is Tuesday.

Mr. Quinn: (Continuing) Which was Tuesday.

The Witness: Yes, that is right, Tuesday afternoon. It was after three o'clock, I think, because I finished my job at Kolo and I went to Kaunakakai.

Q. (By Mr. Quinn): Had you been to Kaunakakai before you went to Kolo? A. No, sir.

Q. When was the next time, then, that you saw John Cho after you had seen him in the Young Brothers office? [89]

A. Wait a minute. Let's see. I can't really recall what happened when I left Honolulu here. I think that was Tuesday afternoon. I didn't go to Kaunakakai before that.

Q. Were you the only tug that came to Kaunakakai on Tuesday afternoon?

A. Well, no; the Mahoe was there, too.

Q. Was the Mahoe with you?

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. It had been with you at Kolo?

A. Well, the Mahoe was at Kaunakakai and I was at Kolo. She comes to Kolo to pick up her barge, which I give to her, because that is a shallow water port. Both of us proceeded to Kaunakakai Tuesday afternoon.

Q. Why did you go to Kaunakakai on Tuesday afternoon?

A. I had orders from the port skipper to go out and salvage the Tenyo Maru which was on a reef.

Q. When you got there Tuesday afternoon, what did you do? Describe your operations, please.

A. Well, I spoke to the skipper of the Mahoe first to see if he had everything ready on the sampan to go ahead with the salvage job. There was rigging of the bridle and see that the tow lines were all set. And I talked to Johnny at that time. He was on a small little skiff, so we proceeded out there, got the boat off the reef with the help of the Mahoe, of course. I didn't pull it off the reef by myself. [90]

Q. Did you try to pull it off yourself?

A. I couldn't do it with the Kolo alone, so the Mahoe threw a line over my bow and we pulled the Tenyo Maru off the reef. I pulled the Tenyo Maru—after casting my line, I pulled the Tenyo Maru alongside with me and we proceeded to Kaunakakai, which was only about five hundred yards distance from where the Tenyo Maru was.

The Court: To help my shorthand here, what is

(Testimony of Joseph W. Kahiapo.)

the name of the skipper of the Tug Mahoe?

The Witness: Ching Ho.

The Court: Agreed?

Mr. Collins: We so stipulate.

Mr. Quinn: What is it?

Mr. Collins: Ching Ho.

Mr. Quinn: Ching Ho is the skipper of the Mahoe.

The Court: The Johnny you have been talking about is Mr. Johnny Cho?

The Witness: Yes.

Q. (By Mr. Quinn): After you got the Tenyo Maru into Kaunakakai, did you stay there that night?

A. Oh, yes. We planned to stay there, because we were figuring if there were no other dry dock facilities or repairs that could be done at Molokai I was to tow the sampan home, complete my end of the salvage job.

Q. Did you go aboard the Tenyo Maru? [91]

A. Yes, sir.

Q. And did you take note of the damage that had been done during the time she was on the reef?

A. We couldn't very well see the damage because she was so situated that it was impossible to see.

Q. Was the ship leaking?

A. She was leaking.

Q. Did she have pumps going while she was at the pier?

(Testimony of Joseph W. Kahiapo.)

A. All through the operation there were pumps going on board.

Q. When was it determined that you would tow the Tenyo Maru back to Honolulu? When did you decide that?

A. Well, that was Wednesday, the following day, about 11 o'clock.

Q. About 11 o'clock Wednesday morning. Did you talk with Johnny about the arrangements for that towage job?

A. We both agreed on the towage job, yes.

Q. Was there any doubt in your mind as to the fact that it had to be towed back to Honolulu?

A. Well, no. I was thinking of navigation safety reasons because that was a disabled craft, and I couldn't leave her sitting in the harbor. She couldn't stay there in the harbor; she would be a menace to the boats that came in; couldn't land around the wharf.

Q. You thought it was your duty as master of a tug to [92] get it out of Kaunakakai before it sank there?

A. No, we didn't think it was going to sink, because our pumps were working faster than the waters were coming in. The dry dock facilities up there, we figured it best to get home to keep my part of the salvage job.

Q. That was your salvage job, as you saw it, to take it off the reef and take it to Honolulu, if necessary?

(Testimony of Joseph W. Kahiapo.)

A. According to orders of the Company I was to do the best that could be done with the sampan at Kaunakakai and I used my own judgment on the case. That was my first salvage operation, and I wouldn't say I was too experienced on that job.

Q. I didn't hear that last.

A. I wouldn't say I was too experienced for that type of job because that was my first salvage operation.

Q. When did the Mahoe leave Kaunakakai?

A. She left that evening at 6 o'clock.

Q. Which evening?

A. Tuesday evening, with a barge to tow to Honolulu.

Q. And she didn't return any more after that?

A. No, sir.

Q. Will you describe what occurred leading up to the cutting loose of the tow. Will you tell what happened when you took the Tenyo Maru in tow until the time she was cut loose.

A. After we decided to tow the Tenyo Maru to Honolulu, [93] we rigged up a bridle around the cabin so she could be secured for the towing job. Then we proceeded, about 12 o'clock, or before 12 o'clock, that afternoon, and everything was going all right. But prior to towing the vessel home, we worked out some kind of signals between us because there were three seamen on board the Tenyo Maru, so as they could let us know if anything was coming up, so we could turn around or try to make some-

(Testimony of Joseph W. Kahiapo.)

thing be more safety for the vessel. Everything was going all right. We were hugging the Molokai coast all the way past Laau, and in the middle of the channel—I think it was in the middle of the Molokai Channel—I waved back to the boys and they waved back to me to signal everything was OK. She was riding high at that time and the pumps were going. So I took a walk right in front of the bow and turned around and the Tenyo Maru was under water. In other words, it happened so fast, I wouldn't know how it happened. For the safety of the boys that were on the Tenyo Maru, I pulled the tug full astern, pulled up all the line I could and chopped it off.

Q. You say when you looked back after going to the bow—first of all, you say you were on the stern and you looked and waved and they waved?

A. Yes, sir.

Q. And after a very short space of time you looked back and it was under water?

A. Yes, sir. [94]

Q. Would you describe what you mean when you say "under water"?

A. The whole cabin went right under the water.

Q. The whole cabin?

A. In fact, the whole Tenyo Maru was under water aft of the bow.

Q. And where were the crew standing on it?

A. They were clinging to the submerged part of the cabin.



(Testimony of Joseph W. Kahiapo.)

Q. And so you then proceeded to take up as much slack as you safely could and then cut your line and then what happened?

A. Well, I swung around to pick up the crew on the boat and in the meantime they were in the water; they dived off the sampan and were in the water. I came alongside where it was safe enough to pick them up. Then we proceeded to Honolulu.

Q. What was the situation of the Tenyo Maru the last you saw it?

A. She was submerged above the cab—I mean, she was submerged all the way down except for the tip of the bow was sticking out of the water.

Q. In other words, her decks were washed?

A. The decks and cabins and everything. She was sort of like this in the water, 45 degree angle (indicating).

The Court: I think it will be better to leave here there for the noon lunch period.

Mr. Quinn: Beg pardon? [95]

The Court: Let's leave her there for the noon lunch period.

Mr. Quinn: Very well, your Honor.

The Court: All right, we will take a recess until 1:30.

(Thereupon, at 12 o'clock noon, a recess was taken until 1:30 p.m. of the same day.)

\* \* \*

Afternoon Session

The Court: Are the parties ready to proceed?

Mr. Quinn: Ready for the Libellant, your Honor.

Mr. Collins: Ready.

JOSEPH W. KAHIAPO

resumed the stand, and testified further as follows:

The Court: Mr. Witness, I remind you that you are still under oath. I believe we left the sampan with its nose out of water. You may proceed from there.

Direct Examination  
(Continued)

By Mr. Quinn:

Q. The last you saw of the sampan Tenyo Maru, Joe, I believe you testified you could see the bow out of the water; is that right? A. Yes, sir.

Q. When you saw that she was awash, did you make any attempt to tow her in that condition? [96]

A. No, sir.

Q. What was the size of the waves in the channel, if you recall?

A. At that time I figured it was about four to five feet.

Q. And the tow was how many feet in back of the tug, about?

A. Before cutting off — before she sank you mean?

Q. Yes.

A. She was about, I would say, about 75 to 80 yards in back of the Kolo.

Q. Seventy-five to eighty yards behind?

(Testimony of Joseph W. Kahiapo.)

A. Yes.

Q. Did you have radio facilities on the Kolo?

A. No.

Q. No radio? A. No, sir.

The Court: This isn't the tug that got lost, is it?

Mr. Quinn: Beg pardon?

The Court: This isn't the tug that got lost, is it?

Mr. Quinn: I don't think so.

The Witness: No. The Momi.

Q. (By Mr. Quinn): Now, Joe, you testified this morning that your orders were to salvage the Tenyo Maru. A. Yes. [97]

Q. And that that was why you took it under tow and took it back to Honolulu; is that correct?

A. That's right.

Q. From whom did you receive those orders?

A. From the port captain and the manager.

Q. Did they make any mention of taking the Tenyo Maru only to Kaunakakai, or any discussion of taking to Honolulu, or any place designation in your instructions at all?

A. No. The only orders I got was to do the best I could up there for the sampan. Being there were no dry dock facilities and that the boat couldn't be repaired at Kaunakakai, I saw it fit to bring the boat back to Honolulu. That is why I undertook the tow to bring it back to Honolulu.

Q. And did you tell John Cho that in the light of your orders you were, in your own mind, authorized to take the tow back to Honolulu?

(Testimony of Joseph W. Kahiapo.)

A. No—well, I understood that everything was fixed between the Company and him and I used my own judgment on that. I told you before that I was inexperienced in that type of job. That was my first salvage job.

Mr. Quinn: I have no further questions.

The Court: Cross-examination?

### Cross-Examination

By Mr. Collins:

Q. You testified that you met Mr. Cho on Sunday afternoon. [98]           A. Yes, sir.

Q. Would you tell us again the circumstances under which you met him?

A. Well, at that time Mr. John Cho was talking to the assistant port captain, and I was there to report for a certain job which I was supposed to handle with the Tug Kolo, and they were talking about his sampan being on the reef and who was going to be there.

Q. And who was present in that discussion?

A. Just John Cho, myself and Hop—Richard O'Neill, assistant port captain.

Q. Mr. Pavao was not there?           A. No, sir.

Q. I believe you also testified that you were scheduled to go over to Molokai on Monday.

A. I did not testify—you said I was scared to go to Molokai?

Q. Weren't you scheduled to go to Molokai on Monday?

(Testimony of Joseph W. Kahiapo.)

A. No, sir, that was my regular job, to go there Monday. I usually go to accept and collect on Tuesday morning, to take it into Kolo harbor. I didn't testify——

Q. Are you regularly scheduled to go to Molokai on Tuesday?

A. On Monday. I usually go there on Monday, I think.

Q. What time do you usually leave on Monday?

A. As soon as we got our stores on board, usually by 9 o'clock, as soon as we get our stores on board.

Q. And what is your usual routine?

A. Well, to proceed to Kolo harbor and lay there overnight and wait for the bigger tugs to come in with their tow, and take away their tow and tow it into Kolo harbor, which is a shallow harbor. The bigger tugs can't bring in there. We were assigned to do that.

Q. After assisting the barge into Kolo harbor, what did you do, normally?

A. We stand by all day long until the barge is loaded, and we secure the tug again for towing and take it back to the big tugs which are usually waiting off port at that time.

Q. And usually come back to Honolulu after assisting the loaded barge out; is that correct?

A. Yes, sir.

Q. So, is it true to say that you normally make a run down to Kolo on Monday——

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. Assist with the barge on Tuesday——

A. Yes.

Q. And then return to Honolulu? A. Yes.

Q. And your return trip to Honolulu was normally on what day? [100]

A. Well, sometimes we change our schedules. The port captain says if it is too late and weather conditions doesn't permit to lay off Tuesday night and leave there first thing in the morning, but most of the time we leave there as soon as we secure the barge to the big tug. We usually leave there at that time.

Q. Do you normally make a run at night?

A. Yes, sir.

Q. You do? On this particular schedule? If the barge was unloaded late on Tuesday, would you come up Tuesday night, or would you wait until Wednesday morning?

A. Like I told you, it all depends on the weather.

Q. But if the weather was favorable, you would come up Tuesday night? A. Yes, sir.

Q. Were you given any written instructions at the time that you shoved off on this trip; that is, when you left Honolulu, were you given any written instructions?

A. The only orders that came verbally from the port captain.

Q. No written orders with respect to your duties in connection with the pineapple barge?

A. No, sir.

(Testimony of Joseph W. Kahiapo.)

Q. After this conference on Sunday afternoon, did you see anybody at Young Brothers before you left on Monday morning? [101]

A. Not that I know of.

Q. You didn't receive any instructions from Mr. Pavao or anybody else at that time?

A. Not that evening. Monday morning I did.

Q. You did Monday morning? A. Yes.

Q. And what were your instructions?

A. To go up there and do the best I can for the sampan.

Q. And who gave you those instructions?

A. Captain Pavao.

Q. And that is, in substance, what was said on Sunday, you say? A. Yes.

Q. Then, as I understand you, you went directly to Kaunakakai? A. Yes.

Q. Arriving there sometime on Monday forenoon?

A. It was about—I don't know what time; it was afternoon anyway.

Q. It was afternoon. You looked over the sampan?

A. I didn't go directly to Kaunakakai. I went to Kolo.

Q. You did not go to Kaunakakai at all?

A. No, sir, not on Monday. Wait a minute. Yes. Your Honor, in case I make any mistake, because this incident happened over a year ago. I can not well remember what happened, what [102] took place all the time.

(Testimony of Joseph W. Kahiapo.)

Mr. Quinn: What?

The Court: He said because this incident took place over a year ago he can not remember well everything that happened. He is asking for a moment or two to refresh his recollection.

The Witness: That part I couldn't answer you so well, whether I did go to Kaunakakai or not.

Q. (By Mr. Collins): Maybe we can refresh your recollection.

A. But I have that all marked down in the statement to the Company what happened.

Q. I am afraid I can't hear you.

A. I gave a statement to the Company what happened, the whole incident, the whole record down there, and I also have the records down in my log books, certain time which happened all the way through. I can not give you specific information.

Q. Maybe we can refresh your recollection on this. Don't you recall having spoken to Mr. Cho, being unable to pull the sampan off on Monday because the tide was low? A. Yes, that's right.

Q. So you recall that you went to the harbor there?

A. Yes, but I told Mr. Quinn I didn't go up there Monday. I did go up there Monday. [103]

Q. And after reporting to Mr. Cho that it would be useless to try to tow it off on Monday, what did you do?

A. I proceeded back down to Kolo and stood by for the tug in the morning.



(Testimony of Joseph W. Kahiapo.)

Q. You assisted the barge in to Kolo, did you?

A. Yes.

Q. When it arrived? A. Yes, sir.

Q. Then what happened after you assisted the barge?

A. It was on Tuesday morning.

Q. Tuesday morning.

A. I stood by all day until in the afternoon the Mahoe—I returned back and I took back the barge out to her and the boat proceeded back to Kaunakakai, after getting orders from the skipper of the Mahoe.

Q. The skipper of the Mahoe ordered you to return to Kaunakakai?

A. Yes, sir.

Q. Did his orders consist of anything beyond that?

A. No, sir.

Q. What was your relation to the captain of the Mahoe?

A. My relationship?

Q. Yes. Was he your boss?

A. No, we worked together. I was supposed to work with him up there. He couldn't do nothing up there unless he had a [104] small type of tug like I had.

Q. You went to Kaunakakai after the captain of the Mahoe ordered you to do so?

A. Yes.

Q. And about what time did you arrive there?

A. That was after four o'clock, I presume.

Q. Did the captain of the Mahoe come up, too?

A. Oh, yes, the both of us were there.

Q. About what time did he arrive, do you recall?

A. We came in about the same time.

(Testimony of Joseph W. Kahiapo.)

Q. Did you discuss with him the question of moving the sampan from the reef?

A. Yes, sir.

Q. Did he give you any orders in connection with it?      A. Yes, sir.

Q. And what were his orders?

A. To back in as close to the reef as I can and send in my 8-inch line and have those men on board the Tenyo Maru rig my line firmly on the Tenyo Maru stern. And I proceeded in pulling. After doing so for about fifteen minutes, we know we couldn't get any headway. The Mahoe put her line on my bow and we pulled the Tenyo. That is the only way we got the Tenyo Maru off the reef.

Q. At the time you were pulling alone, was the captain of the Mahoe anywhere around? [105]

A. He was standing alongside of my mooring, alongside but further in the deep.

Q. Was he directing you?      A. Yes.

Q. Then after you were not able to pull it off, the Mahoe made a tandem hitch; is that right?

A. Yes.

Q. After she was pulled off, what happened?

A. I cast off the Mahoe's line from my bow, pulled alongside the sampan and took it alongside the wharf at Kaunakakai.

Q. Did the Mahoe go in, too?      A. Yes.

Q. Did you confer at all with the captain of the Mahoe thereafter?

A. No. Well, he went on board the sampan to

(Testimony of Joseph W. Kahiapo.)

have inspection. Like I told you, I didn't have much experience in inspecting the type of vessel, and so he went ahead to do the inspection job.

Q. I can't hear you.

A. The both of us were on the Tenyo Maru at that time inspecting, but he was the one that was head of the inspection. He went ahead and inspected.

Q. But you did not go on the sampan?

A. I was on the sampan with him, but not doing the inspection. [106]

Q. Did he give you any orders in connection with that sampan?      A. What do you mean?

Q. Any orders with respect to towing it to Honolulu.

A. No, he left it up to me, after he left Kaunakakai at 6 o'clock.

Q. Did he give you any instructions with respect to calling Honolulu?      A. No, sir.

Q. He did not mention that you should telephone either Mr. Harrison or Mr. Pavao?

A. No, sir.

Q. How long did he stay there?

A. He just stayed a little while, until we had supper on board the Mahoe, and then he proceeded back to Honolulu with his store.

Q. Did you tell the captain of the Mahoe that you intended to bring the sampan to Honolulu?

A. Yes, sir.

Q. What did he say?

(Testimony of Joseph W. Kahiapo.)

A. He didn't say nothing.

Q. Did you stay aboard your tug overnight?

A. Yes, we stayed there overnight.

Q. Did you check the sampan at any time during the night?

A. Well, we checked her once, and we found out that she [107] was leaking a considerable amount of water.

Q. When you say "we," whom do you mean?

A. My crew on board the vessel.

Q. But you only checked it once?

A. Yes, well, we checked it, and in order to be on the safe side, we run a bridle, sort of a bridle, from our tug. We were outside and the sampan was inside. We run a bridle under the sampan to the wharf and secured it to our tug, fore and aft, to act as a cradle, so she only go down—if she go down so far.

Q. When did you run that cradle under it? You call it a cradle?      A. Yes.

Q. When was it?

A. Sometime that evening—I don't recall.

Q. Was it as soon as you tied up, or some time after that?      A. No. Some time after that.

Q. Was it before or after the captain of the Mahoe left in the Mahoe?

A. It was after the captain left.

Q. The sampan was being pumped all the time, was it?      A. Yes.

Q. Was that cradle put under there at your

(Testimony of Joseph W. Kahiapo.)

suggestion or at Mr. Cho's suggestion? [108]

A. My suggestion.

Q. On occasions that you observed the sampan, did you find that the water was going down?

A. Well, I think the pump must have stopped, or something, before that, see, and the water came leaking in.

Q. The pump stuck, you say?

A. The pump must have stuck, or something, I don't recall what happened. I was on board our vessel. We were taking a nap at that time.

Q. When you first went in and looked at the sampan, was there much water in it at that time?

A. It was just above the engine clutch.

Q. About how many feet of water was it?

A. About three feet of water.

Q. And when was the next time you looked at it?

A. That was in the morning.

Q. You didn't look at it again until morning?

A. Well, she dried up after we run our cable under and got the pumps going.

Q. How long did it take to dry up?

A. About two hours.

Q. And in the morning she was dry?

A. Yes, with the pumps going full force.

Q. Was she dry at the time—were you there when the pumps were changed? [109]

A. Yes, she was dry at that time when we changed the pumps.

Q. Did Mr. Cho, at any time, say to you that he

(Testimony of Joseph W. Kahiapo.)

had checked with Mr. Harrison and Mr. Pavao in Honolulu either by telephone——

A. No. But before the captain of the Mahoe left, he told me that he had checked with—Mr. Cho checked with the port captain on the tow fee and salvage operation. That gave me an understanding I was supposed to tow that vessel back to Honolulu. That is when I told the captain of the Mahoe I was going to tow the sampan home.

Q. You say the captain of the Mahoe told you that Mr. Cho had told him——

A. No, Mr. Cho had a verbal conversation on the telephone with the port captain in Honolulu on towing fee. That gave me an understanding that I was supposed to tow the sampan back to Honolulu.

Q. Before that time you were not sure whether you were supposed to or not?      A. Yes, sir.

Q. You were not sure; is that correct?

A. Yes, sir.

Q. And when did you first hear of this telephone conversation?

A. That was just before the Mahoe skipper left with his [110] tug to Honolulu.

Q. Did you speak to Mr. Cho yourself about that?      A. No, sir.

Q. You never inquired of him as to whether he had made the telephone call or what had been said in the conversation?

A. No, I was taking my orders from the captain

(Testimony of Joseph W. Kahiapo.)

of the Mahoe all the time because Mr. Cho was all the time busy with the sampan, getting pumps and having men run the pumps, and all the odds and ends.

Q. Did the captain of the Mahoe tell you to bring it up, or did you tell him?

A. I told him. He asked me if I was going to tow it back, and I said 'yes.'

Q. He did not give you an order?

A. That is what I told you; I took an understanding that because Mr. Cho and the port captain were talking of towing fees, it was my understanding I was to tow the sampan home, but he did not order me. If he had orders I was not supposed to tow the sampan home, he would have told me then and there, because I had had no orders from Honolulu not to tow it home. My orders were to do the best I can for the sampan.

Q. How long had the new pump been aboard before you finally took the sampan under tow?

A. Oh, I figure about a little over an hour, or something.

Q. Did you observe its operations? [111]

A. Yes, she was pumping all right.

Q. Working satisfactorily?

A. Yes, sir. She was a bigger pump than the one they had previously.

Q. It was not running continuously, was it?

A. Well, we run it until the water got so low—below the pumping hose, and then we stop the pump,

(Testimony of Joseph W. Kahiapo.)

and then when the water starts rising up, we continue pumping again. In other words, the pump was pumping the water out faster than it was coming in.

Q. Was the cradle kept under the sampan until you took it in tow?

A. No. In the morning we took out the cradle because we saw she was out of danger of sinking.

Q. About what time in the morning?

A. The cradle was only left there for the safety reason. We had to go to bed. We had only one man on watch. In case she go down fast, she would stay afloat.

Q. And that man was on the sampan or tug?

A. On the sampan. There were three men on the sampan, but one of them stood watch.

Q. In the morning, as soon as you saw the water was low in the hull, you took the cradle off from under it?

A. Yes, sir.

Q. Did you have any discussion with Mr. Cho on Wednesday [112] morning in connection with the tow to Honolulu?

A. Well, I asked him what was the best thing. He figured it was all right to tow it back, but before that we tried to dry dock her out there, and they got the crane, and the crane couldn't lift her aboard. We tried to get divers to go under and plug up the hole, but it was too risky a job, so we figured it was the best thing to bring her home.

Q. When you say "we figured," does that mean you or Mr. Cho?



(Testimony of Joseph W. Kahiapo.)

A. I figured it mostly, because I wanted to complete my part of the deal and I didn't want to leave a disabled craft in Kaunakakai harbor, and later be sunk in there.

Q. The only discussion you had with Mr. Cho that morning was the discussion that resulted in this decision to tow it to Honolulu; is that correct?

A. Yes, sir.

Q. Did you make any inquiry about the number of men that were on the sampan, or who had been on the sampan on the trip?

A. Well, I made sure that there was at least two or three men on board the vessel to run the pumps on the way home, because we have to have somebody to stand by the pumps.

Q. Did you know how many hand pumps they had on board?      A. No, sir, not at that time.

Q. Did you talk to the captain of the sampan about the [113] tow?

A. It was all up to the owner.

Q. Before you started off, did you have any discussion with a Mr. Kalani?

A. Well, the only discussion we had was about signaling back and forth to each other.

Q. What was the substance of that?

A. Well, I told him that I was going to look back and wave back to them at half-hour intervals just to see if everything is all right, to keep a man posted so they could watch the tug.

Q. They were to signal you every half hour?

(Testimony of Joseph W. Kahiapo.)

A. No, I was to signal to see if everything was all right?

Q. How? A. By hand raising, that is all.

Q. And he was to answer? A. Yes.

Q. Did you signal every half hour you were under way?

A. We could plainly see. I seen the vessel was riding high. We signaled every little while, sometimes it is less than half hour's time.

Q. Were you in a position where you could watch the operations of the pump?

A. Well, we could see the pump—we could see the water [114] coming out from the pump.

Q. The sampan was always in a position where you could observe that? A. Yes, sir.

Q. From your observations, how was the pump working?

A. Well, the pumps were working, and when we see the pumps go off, we would signal back to them to see whether they were all right or on the blink.

Q. They went on and off?

A. When they pumped off all the water, they shut it off, and when it filled up with a certain amount of water, they would start pumping again.

Q. And when was the first time you observed that the sampan was taking more water than she could handle?

A. That was just before going to the bow before I noticed.

Q. Just before where?

(Testimony of Joseph W. Kahiapo.)

A. Just before I went to the bow.

Q. You mean this happened between these half-hour signals?

A. No. I told you before that it went down so fast we didn't know what time interval it was when it happened.

Q. Was any signal given from the sampan that she was in trouble?

A. Just when I turned around and found out she was sinking. [115]

Q. How did they give you that signal?

A. They didn't signal at all. She went down so fast, they were signaling for me to come back.

Q. The last signal you received from the sampan was that everything was all right; is that right?

A. Yes, sir.

Q. When you first observed that she was going down, could you give us some idea as to what her position was with respect to the water, what portion was above water?

A. She was all the way down to the gunwales.

Q. That means that the entire main deck was awash?

A. Yes, sir, and I continued towing her full speed, trying to upright her bow and empty a little water out, and it didn't do any good. She kept going down further and the crew was calling me to come back and pick them up.

Q. But the first time you knew anything was wrong was when you saw her decks awash?

A. Right.

(Testimony of Joseph W. Kahiapo.)

Q. You had received no word from the sampan prior to that time that everything was not right?

A. Everything was all right five minutes before that.

Q. Did the men on the sampan shout anything over to you; could you hear them?

A. I can't hear them from a distance.

The Court: Could? [116]

The Witness: Couldn't hear them from a distance.

Q. (By Mr. Collins): Did the men on the sampan jump from her, dive into the water, before you cut your line?

A. No, I cut my line before they went overboard.

Q. What was her position at the time you cut the line? A. About 20 feet astern of me.

Q. What was the position of the sampan—what portion was out and what under water?

A. Well, the cabin deck was above the water. About half of it was awash. It was sort of an angle, that part of the bow was out of the water. The men were clinging to the submerged part of the cabin.

Mr. Collins: That is all.

The Court: Redirect?

Redirect Examination

By Mr. Quinn:

Q. Joe, just one or two questions. You stated that you could see the pumping going on and now and then the pumping would stop.

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. And I believe you then stated that when they got all the water out, they would stop pumping, and that is the explanation for that. You don't know why the pumping was stopping at that time, do you? I mean, you assumed it was because they got the water out? [117] A. Yes, sir.

Q. But you didn't get to see it or talk to anybody to find out what the status of the water in the sampan was at the time the pump stopped, did you?

A. Yes, sir.

Q. You weren't able?

A. I weren't able.

Q. Do you know where the sponsons are in the sampan? A. Sponsons? No.

Q. A sampan has a part that protrudes off the hull on either side up toward—

A. You mean the protruding part of the gun-wales?

Q. Yes. A. Yes.

Q. Now, up forward, that was out of the water; is that correct? A. Yes, sir.

Q. And about how many feet freeboard did it have forward, if you can tell?

A. We figured about—she was sticking out of the water about four feet?

Q. Four feet? A. Yes.

Q. That is at the very bow?

A. At the very tip of the bow, yes. [118]

Q. And at the cabin how many feet freeboard did it have?

(Testimony of Joseph W. Kahiapo.)

A. Well, after I got those men on board, we noticed the cabin was awash because she went up that way and only that part of the bow was up. Just the cabin. Down here she was submerged.

Q. The deck aft was awash then; is that right?

A. Yes.

Q. What is the normal freeboard on a sampan up at the bow, do you know?

A. You mean a regular draft; I don't know for that type of boat.

Mr. Quinn: I have no further questions.

Recross-Examination

By Mr. Collins:

Q. You did notice, Mr. Kahiapo, that the sampan, when she was behind you—that the pump would start and would stop? A. Yes.

Q. About how many times would you say that it started and stopped, as best you could judge?

A. That I don't know.

Q. Would you say four or five times, roughly?

A. It could be more than that.

Q. Would it be more than once or twice?

A. I would figure less than three or four times.

Q. Three or four times.

Mr. Collins: That is all, your Honor. [119]

The Court: All right, you are excused. Next witness.

(Witness excused.)

Mr. Quinn: Mr. Abell, please.

EBERESTO ABELL

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Will you please state your name?

The Witness: Eberesto Abell.

The Court: How do you spell it?

Mr. Quinn: (Spelling) E-b-e-r-e-s-t-o.

The Court: And the last name is what?

The Witness: Abell. (Spelling) A-b-e-l-l.

The Court: How old are you?

The Witness: Forty-four.

The Court: Forty-four?

The Witness: Yes.

The Court: Do you live here in Honolulu?

The Witness: Yes.

The Court: Are you employed?

The Witness: What?

The Court: Where do you work?

The Witness: I work fishing.

The Court: You work fishing?

The Witness: Yes. [120]

The Court: On what boat?

The Witness: Likelike.

The Court: Who owns that?

The Witness: Half Pake, half Hawaiian.

The Court: What is his name?

The Witness: Likwai.

The Court: Are you a citizen of the United States?

(Testimony of Eberesto Abell.)

The Witness: No.

The Court: Citizen of the Republic of the Philippines?

The Witness: I don't know.

The Court: Where were you born?

The Witness: I was born in the Philippines.

The Court: All right. Take the witness. You are going to have to speak good and loud so the gentlemen sitting down there can hear you, too. I take it if you are a fisherman you have occasion to shout above the sound of the motor of your boat, so I know you can talk good and loud here so we can all hear you. There is nothing to be afraid of. Just listen to what the lawyers ask you, make sure you understand their questions, and answer the questions if you can.

### Direct Examination

By Mr. Quinn:

Q. Mr. Abell, can you talk as loud as I am talking now? A. Yes.

Q. Let me hear you. [121]

The Court: Give him something to work on.

Q. (By Mr. Quinn): You talk just the way I am talking now so everybody can hear you.

Where were you working last year?

A. Last year I work Young Brothers.

Q. What did you do at Young Brothers?

A. Deck hand.

Q. Deck hand? A. Yes, sir.

Q. What boat? A. Kolo.



(Testimony of Eberesto Abell.)

Q. Do you know Joe Kahiapo?

A. Yes, captain of the boat.

Q. He was your captain? A. Yes.

Q. Do you know the boat Tenyo Maru?

A. Yes, I know from Kaunakakai, he pull him out Honolulu. Then between Honolulu and Kaunakakai sink down, but he no sink down.

Q. On the way back from Kaunakakai she went down?

A. She sink down between Honolulu and Molokai.

Q. About how far down?

A. About the level of the deck.

Q. Level with the deck? A. Yes. [122]

Q. What did Joe do?

A. Joe he said more better cut. I told Joe more better not cut, it afloat yet. This guy a little bit scare, and he cut the line.

Q. Go ahead.

A. So he cut the line and turn back and pick up the men and he come back to Honolulu on this boat. He left it in the channel.

Q. You thought it was better not to cut the line?

Mr. Collins: I object to that question.

Mr. Quinn: He said that and I am trying to get back to that point. I am trying to lead him. I think the record will show he has said that once.

The Court: I thought he did, too.

Mr. Collins: I would wish to have the question on his thoughts stricken, if your Honor please.

(Testimony of Eberesto Abell.)

The Court: Let us first of all read back exactly what he said, so we can all have the benefit of it. There was some discussion between the captain and himself as to what was better to do.

(Answer read.)

Q. (By Mr. Quinn): Why did you tell Joe not to cut the line?

A. I tell him more better no cut; she no sink, I think; it floating, the boat. [123]

Q. How long have you been on boats?

A. A line about 40 feet.

The Court: The question is: How long have you been on boats? How many years have you been at sea?

The Witness: Who? Me?

The Court: Yes, you.

The Witness: About eight months for Young Brothers.

Q. (By Mr. Quinn): About eight months for Young Brothers. How much longer before that? How long on boats before you worked for Young Brothers? A. Last year, 1948.

Q. Have you ever been on a sampan?

A. I work sampan. Three months I work sampan, and then I quit for Young Brothers.

Q. What did you do before you worked for Young Brothers?

A. Deck hand with pineapple.

Q. Deck hand with pineapple? A. Yes.

Q. How long with the Pineapple Company?

(Testimony of Eberesto Abell.)

A. I forget the time.

Q. How many——

A. I work for Young Brothers first time for seven years.

Q. What did you do before you worked for the Pineapple Company?

A. I work deck hand for tug. [124]

Q. Deck hand for tug?           A. Yes, sir.

Q. How long?

A. First time I work seven years.

Q. Did you think——

Mr. Collins: Shall I object at this point, your Honor?

The Court: You could almost cut that one with a knife.

Q. (By Mr. Quinn): Did you think that the sampan could have been towed?

Mr. Collins: I object, your Honor——

A. No.

Mr. Collins: (Continuing) ——on the basis that this man has not been qualified as an expert and therefore can not give an opinion on it. The answer calls for an opinion.

Mr. Quinn: If the Court please, the *only* a person could become an expert, knowing the characteristics of sampans and boats when they are under tow, is by having been a deck hand or otherwise engaged in tug work and in maritime conditions. This man instinctively told Joe Kahiapo, don't cut the line. Now, I think his opinion is of value.

(Testimony of Eberesto Abell.)

Maybe if the Court doesn't feel he is the best expert that could be gotten on this, that would go to the weight, but certainly he is entitled to give his opinion. [125]

Mr. Collins: If your Honor please, this has to do, apparently, with the condition of the sampan. There was no evidence that this man has ever worked on a sampan, ever towed on a sampan and, as far as the questions are concerned, has been near a sampan. The work on the pineapple barges, we think, would not qualify him at all to speak on sampans. And there is no evidence that the tug work he was doing was any more than the tug work of pushing ships around.

The Court: I think he has already ventured the opinion that you wish to have him express, and I don't think you have laid an adequate foundation for him to express an opinion as an expert on towage. The objection is good.

Mr. Quinn: Thank you.

Q. (By Mr. Quinn): How did Joe act when he went to cut the line?

A. I don't know. Him do it. Joe the captain; that his business.

The Court: Can you speak a little bit more distinctly so we can all hear you the first time. I understood from the Clerk, who caught what you said, that you said you don't know; Joe is the captain; that is his business.

The Witness: I no business, because him business cut.

(Testimony of Eberesto Abell.)

Q. (By Mr. Quinn): Did Joe say why he cut the line?

A. I don't know, see; him business. I no business talk [126] to him; him no afraid of me; him boss because him captain.

The Court: Didn't you say somebody was afraid of you?

The Witness: No.

The Court: You used the word "afraid."

The Witness: Him boss to hold the line for the boat to come home.

Mr. Quinn: If the Court please, I wonder if it isn't within the discretion of the Court at this time to give me the right to lead the witness, not on the ground of a hostile witness, but close enough to it, in the interest of getting the truth in this admiralty action.

The Court: Well, I will grant we are all having a little difficulty in hearing exactly what the man says, but I think he understands your questions. I gather very distinctly that his attitude is he doesn't want to express an opinion as to what he might have done because, after all, he was just an employee under the captain, and it was the captain's business to know what to do and why he did it. Isn't that about what you are trying to say?

The Witness: That is right, sir.

The Court: And he doesn't want you to put him in an embarrassing position.

(Testimony of Eberesto Abell.)

Mr. Quinn: Very well, your Honor.

The Court: In the interest of getting along, if you [127] can clarify the questions in some way so that we can make more rapid progress, I will see how that gets along.

Q. (By Mr. Quinn): Did Joe say that he was afraid something might happen to the Kolo if the line was not cut?

A. He hold the steer for the boat. He hold them for the steer. He look to behind, but the boat it sink. I think Joe a little bit scared; that is why he cut the rope at that time. So I told him, Better no cut because it still float, I told him; but him cut. And I talk no more because it was him business.

Mr. Collins: If your Honor please——

The Court: Wait just a minute. But first, will you read it.

(Answer read.)

Mr. Collins: I want that portion having to do with what this witness thought that the captain thought stricken as being hypothetical.

The Court: It is quite obvious to me that we are getting an expression of this man's opinion. I think I can evaluate rather than strike it. I will let it stand and give an exception.

Incidentally, I am trying to acquire some concrete knowledge of admiralty. In anticipation of this case I did some reading, and I ran across an authority to the effect that objections don't seem to have much weight in admiralty, that evidence

(Testimony of Eberesto Abell.)

can [128] come in on appeal; they have the right *de novo* as far as the Supreme Court of the United States. If that be sound, I don't know what good it does to object or why I should rule on objections.

Mr. Quinn: I think your Honor has taken a slight misinterpretation of the authorities you have read. That is certainly true as far as pleadings are concerned, that they will amend pleadings before, during, or after trial or on appeal, at any time, in the highest appellate court, but I do believe that the Court has the right to restrict the evidence.

The Court: Well, it would seem so to me, or you could bring in everything and never stop.

Mr. Quinn: I have no further questions of Mr. Abell.

Mr. Collins: I have no questions, your Honor.

The Court: All right. You are excused. Thank you.

(Witness excused.)

Mr. Quinn: I next call Mr. Kagimoto.

The Court: Before we hear him, we will take a short recess during which I would like to see both of you in Chambers on an irrelevant matter.

(Recess had.)

Mr. Quinn: If the Court please, at this time I would like to offer in evidence a bill of sale. I think that is satisfactory to you?

Mr. Collins: Yes. [129]

Mr. Quinn: Without further identification.

The Court: Very well, it may be received by agreement.

The Clerk: As Libellant's No. 1.

(Thereupon, the document above referred to was marked Libellant's Exhibit No. 1 and received in evidence.)

### LIBELLANT'S EXHIBIT No. 1

United States Customs Service Bill of Sale of licensed vessel under 20 tons.

Kong Paik Woon, also known as John Pac Un Kong and James Anderson to Young Kun Cho, Oil Screw, called the Tenyo Maru.

Customhouse, Honolulu, Aug. 16, 1946.

[Seal]      /s/ [Illegible]

Deputy Collector of Customs.

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The United States of America  
United States Customs Service  
Bill of Sale of Licensed Vessel Under  
Twenty Tons

To all to whom these Presents shall come, Greeting:

Know Ye, That Kong Paik Woon, also known as John Pac Un Kong, 947 Wawamalu Road, Honolulu, Territory of Hawaii, owning 50%, and James Anderson, 432 Kaliamoku Street, Honolulu, Territory of Hawaii, owning 50%, the sole owners



of the Oil Screw or vessel called the "Tenyo Maru" of the burden of nine (9) net tons, or thereabouts, for and in consideration of the sum of Six Thousand and No/100 (\$6,000.00) dollars, lawful money of the United States of America, to them in hand paid, before the sealing and delivery of these presents, by Young Kun Cho, 727 Palani Avenue, Honolulu, T. H., Sole Owner, the receipt whereof they do hereby acknowledge and they being therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said Young Kun Cho, 727 Palani Avenue, Honolulu, T. H., Sole Owner, his heirs, executors, administrators, and assigns, the whole of the said Oil Screw or vessel, together with all of the masts, bowsprits, sails, boats, anchors, cables, tackle, furniture, and all other necessities thereunto appertaining and belonging; the License of which said Oil Screw or vessel is as follows, viz:

True Copy of the Latest License

The United States of America

Treasury Department, Bureau of Customs

Permanent License No. 8.

Official No. 238590.

Measured at: Honolulu, 1939.

Number of Crew, excluding Master: 3.

Horsepower: 30.

Type of engine: Oil.

License of Vessel Under Twenty Tons

In Conformity to Title L, "Regulation of Vessels in

Domestic Commerce," of the Revised Statutes of the United States,

Kong Paik Woon, Managing Owner, having taken and subscribed the oath required by law, and having sworn that Kong Paik Woon, 947 Wawamalu Road, Honolulu, Territory of Hawaii, owning 50%, and James Anderson, 432 Kaliyamoku Street, Honolulu, Territory of Hawaii, owning 50%, are citizens of the United States and the sole owners of the vessel called the Tenyo Maru of Honolulu, and that the said vessel was built in the year 1921, at Honolulu of wood as appears by Permanent License Number 10 issued at Honolulu, December 2, 1943, now surrendered; property changed, and said license having certified that the said vessel is an Oil Screw; that she has one deck, one mast, a clipper head, and a square stern; that her register length is 48.1 feet, her register breadth 10.7 feet, her register depth 5 feet, that she measures as follows:

Tons, 16.78.

Gross Tonnage, 16.78.

Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):

Crew space, 1.36.

Boatswain's stores, .23.

Propelling power (actual space, 2.94), 32%.

Total Deductions, 6.96.

Net Tonnage, 9.

The following-described spaces, and no others,

have been omitted, viz: Forepeak....., aftpeak....., other spaces (except double bottoms) for water-ballast.....; open forecastle....., open bridge....., open poop....., open shelter-deck....., cabins....., companions....., galley....., skylights....., wheel-house....., water-closets.....; anchor gear....., condenser....., donkey engine and boiler....., steering gear....., light and air over propelling machinery 1.22, other machinery spaces.....

Proof being had of her admeasurement, she shall not be employed in any trade while this license shall continue in force whereby the revenue of the United States shall be defrauded, and the master having also sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified: License is hereby granted for the said vessel to be employed in carrying on the Mackerel Fishery for one year from the date hereof, and no longer.

Given under my hand and seal, at the Port of Honolulu, in the District of Hawaii, this 2nd day of November, in the year One Thousand Nine Hundred and Forty-five (1945).

H. PELATOWSKI,

Deputy Collector of Customs.

To have and to hold the said Oil Screw "Tenyo Maru" and appurtenances thereunto belonging unto him, the said Young Kun Cho, his heirs, executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of himself the said Young Kun Cho, his heirs, executors, administra-

tors, and assigns forever: And they, the said Kong Paik Woon, also known as John Pac Un Kong and James Anderson, have promised, covenanted, and agreed, and by these presents do. . . promise, covenant, and agree, for their heirs, executors, administrators, and assigns, to and with the said Young Kun Cho, his heirs, executors, administrators, and assigns to warrant and defend the said Oil Screw or vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, The said Kong Paik Woon, also known as John Pac Un Kong, and James Anderson have hereunto set their hands and seals this 13th day of August, in the year of our Lord one thousand nine hundred and forty-six (1946).

Signed, sealed, and delivered in presence of—

/s/ N. KOJIMA.

[Seal] /s/ KONG PAIK WOON,

[Seal] /s/ JAMES ANDERSON.

Territory of Hawaii,  
County of Honolulu—ss.

Be It Known That on this 13th day of August, 1946, personally appeared before me, Kong Paik Woon, also known as John Pac Un Kong, and James Anderson, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 13th day of August, A.D. 1946.

[Seal]      /s/ NOBORU KOJIMA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.

Admitted April 5, 1949.

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Mr. Quinn: Which will show the title in Young Cho, who is also John Y. Cho, the Libellant in this case.

The Court: The article sold for the Tenyo Maru?

Mr. Quinn: Yes, your Honor.

At the present time I have Mr. Kagimoto as a witness, who understands English but does not speak it, your Honor, and we have brought Mr. Koichi Kubo, who can translate Japanese into English, provided he meets the Court's approval as an interpreter. I wonder if the Court would like to ask Mr. Kubo some questions.

The Court: I don't understand Japanese. I am sure that he is satisfactory, if he is satisfactory to the Libellee.

Mr. Quinn: If it satisfies the Court——

Mr. Collins: If the Court is satisfied, the Libellee will abide by the Court's judgment.

The Court: I think we can tell best as we go along. Will you come forward and give your name to the reporter?

The Interpreter: Koichi Kubo. [130]

(The Interpreter, Koichi Kubo, was thereupon duly sworn.)

## JIROMATSU KAGIMOTO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows (through Interpreter, Koichi Kubo, duly sworn):

The Court: Have you ever interpreted in court before?

The Interpreter: No, I never did, sir.

The Court: Well, first of all, speak clearly and distinctly, and your only function is to act as sort of a machine. You take the English question and translate it exactly into Japanese so that the witness may understand it; and when he answers the question, regardless of whether it makes sense to you or not, you take his Japanese words and turn them back into English, so we can hear what he did say.

The Interpreter: Yes, sir.

Mr. Quinn: Mr. Kubo, I will address the question direct to Mr. Kagimoto and then you translate it.

The Interpreter: All right.

## Direct Examination

By Mr. Quinn:

Q. Will you state your name, please?

A. Jiromatsu Kagimoto.

Q. What is your occupation, Mr. Kagimoto?

A. Fisherman. [131]

Q. Where do you live?

A. 1516-A Emma Street.

The Court: Honolulu?

(Testimony of Jiromatsu Kagimoto.)

The Witness: Honolulu.

Q. (By Mr. Quinn): What is your citizenship, Mr. Kagimoto? A. American citizen.

The Court: Then why can't you speak English?

The Witness: Was in Japan when I was small.

The Court: Never too old to learn. Are you a citizen of the United States exclusively, only, or are you also a subject of Japan?

The Witness: During the war it was cut.

The Court: All right.

Q. (By Mr. Quinn): How long have you been a fisherman, Mr. Kagimoto?

A. From 1930 to 1941; from '46 up to this date.

Q. During that time for many years have you fished from sampans?

A. On a sampan right along, sir.

Q. All the time. Do you own a sampan?

The Interpreter (Interpreting): He owns one-third of a share of a boat.

Q. How long has he owned that third of a share?

A. Ending of August, 1946, up to now. [132]

Q. Did he ever own any sampan in the period 1930 to 1941?

The Interpreter: In 1939 him say he bought a boat.

Q. What is the name of the sampan you bought in 1939? A. Shin Toku Maru.

Q. Mr. Kagimoto, are you familiar with the characteristics of a sampan when it is partially submerged?

A. (The Interpreter): Well, he said he had a

(Testimony of Jiromatsu Kagimoto.)

previous experience with the Shin Toku Maru. Says she was rammed by an AKA boat and the bow was ripped off and she was towed in, Kewalo Basin.

Q. Mr. Kagimoto, when the bow was ripped off, did the Shin Toku Maru take water?

A. She was flooded.

Q. Did you know the ship Tenyo Maru?

The Interpreter: Yes, he says he has seen Tenyo Maru.

Q. Was that ship the same size and general construction as the Shin Toku Maru?

The Interpreter: He says he is not sure, but just by looking, approximately it is about the same idea.

Q. Where is the Shin Toku Maru now?

A. It is in Honolulu, and it is owned by one of the teachers at University of Hawaii.

Q. And what is the name of the Shin Toku Maru now? A. Elena. [133]

Q. Mr. Kagimoto, if a sampan has a leak in its bottom so that its decks are awash, and it has some three or four foot freeboard in the bow, do you think that such a sampan can be towed to safety?

Mr. Collins: If your Honor please, I don't believe that contains all the necessary items for a hypothetical question if intended to be directed to this particular case. There is no mention made of conditions at sea or any other important factors that must necessarily influence the answer to such a question.



(Testimony of Jiromatsu Kagimoto.)

The Court: It is a little skimpy.

Mr. Quinn: If the Court please, we have put into that question, I believe, sufficient to get the general characteristics of a sampan, which is the first question. I want. In other words, the sampan is a very unusual boat in that very regard. It has the sponsons and a great deal of extra wood in it for the sole purpose of not being sinkable. Now, the average type of pleasure craft, or other vessel, is heavy enough for its buoyancy that when it fills with water, irrespective of the sea or wind conditions, it is going to go down, whereas a canoe, on the other hand, on a sampan fills full of water and stays on the surface. My question is directed to that characteristic of the sampan which exists irrespective of sea or wind.

The Court: All right. [134]

Mr. Collins: May we have an exception, your Honor?

The Court: Yes. It is allowed as a general question, and it is recognized that it does not take into consideration all the factors here involved; as a general question, hypothetical in nature.

Mr. Quinn: As to the characteristics of the sampan, yes, your Honor.

The Court: Do you have the question in mind? First let the reporter read it.

(Question read.)

The Interpreter: Well, he said he don't know about these other boats, but according to his boat,

(Testimony of Jiromatsu Kagimoto.)

the bow was all broken off so the deck was awash, but then it didn't sink, he says.

Q. (By Mr. Quinn): What sort of an engine did the Shin Toku Maru have?

A. At least 30 horsepower.

Q. Mr. Kagimoto, are you familiar with usual wave conditions in the Molokai Channel?

The Interpreter: He said he cannot say because today it may be rough and tomorrow it may be calm.

Q. Mr. Kagimoto, are you familiar with the usual wind conditions in the Molokai Channel?

The Interpreter: He says it is hard to estimate but then it is much calmer than north of Oahu, he says. [135]

Mr. Quinn: Where is Barbers Point?

The Interpreter: Barbers Point is northwest, isn't it?

Q. (By Mr. Quinn): Mr. Kagimoto, if a sampan had a leak in its bottom so that its decks were awash and so that it had three to four feet free-board in the front and were being towed in the Molokai Channel where there were waves of three to four feet and where the wind conditions were a little bit more strong than usual, do you think that that sampan could be safely towed to Honolulu?

Mr. Collins: I object to that question, your Honor. We have not located the sampan any place but in Molokai Channel. It might be many miles

(Testimony of Jiromatsu Kagimoto.)

from Honolulu; it might be quite close to Honolulu; and I believe that would be a very important consideration in answering that question.

The Court: Yes, and it also assumes now that he knows something about tug boats and the skill of towing.

Mr. Quinn: I don't think it does, your Honor. If it is ambiguous in that respect, I would withdraw it and reframe it. The question is directed not so much to the skill of towing, which is, of course, in issue here, but the question of whether or not the sampan will sink under those conditions as described when it is under motion, or whether it is possible to keep it in motion and move it toward a safe harbor. That is the aim and end of the question. [136]

The Court: Well, as I listened to the question, the thing that bothered me was that it took him into the realm of the skill of towing; and, as Mr. Collins says, a lot depends on where it is in the channel.

Mr. Quinn: If the Court please, I will amend the question to add to it that element of distance and location in the channel, and perhaps I will just reframe the question to exclude any idea of the towing skill of this witness.

The Court: All right.

Q. (By Mr. Quinn): Mr. Kagimoto, do you know where Laau Point is?

The Court: Spell it?

Mr. Quinn (Spelling): L-a-a-u.

(Testimony of Jiromatsu Kagimoto.)

The Interpreter: He says he never been at that point.

Q. (By Mr. Quinn): Do you know where the point of Molokai is, which is closest to the Island of Oahu?

The Interpreter: He said that it is a point over there they call kita no hana. It is a north point.

Q. Mr. Kagimoto, is there a light on that point?

A. No light, sir.

Q. Mr. Kagimoto, what is the name of the point that you pass in proceeding from Molokai to Honolulu, the last point before you enter the middle of the channel?

The Interpreter: He says kita no point is the last point. [137]

Q. What?

The Interpreter: Kito no hana is the last point because, he say, the way they fish is northwest of that side.

Q. Now, Mr. Kagimoto, if a sampan is in Molokai Channel between eight and ten miles from the point closest to Oahu, and if its decks are awash and its bow has three to four feet freeboard, and if there are waves of three to four feet high and winds a little stronger than normal in the channel, and if that sampan is taken under tow so that it is moving, in your opinion will that sampan stay afloat?

The Interpreter: Well, he says he don't know about somebody else's boat, but through his own experience, he say, a little wind won't bother, but

(Testimony of Jiromatsu Kagimoto.)

bigger waves will bother, will hamper, but as far as whether that boat will sink or not, he cannot say, because that is not his boat and he wasn't there, but his boat didn't sink easy.

Mr. Quinn: Your witness.

Cross-Examination

By Mr. Collins:

Q. How far off Barbers Point was your sampan when it was rammed?

The Interpreter: About a mile out, he said.

Q. Was the sampan in the lee of the island?

The Interpreter: He say about a mile west from Barbers Point, so it would be on the leeward side, he said. [138]

Q. On the leeward side. Are you familiar with any other sampan that has been similarly rammed or has flooded to that extent?

The Interpreter: He don't know.

Q. He does not.

Mr. Collins: That is all.

Redirect Examination

By Mr. Quinn:

Q. From the point on Barbers Point where your boat was rammed, where was it towed?

A. Kewalo Basin, sir.

Q. Did you ever hear of a boat called the Kasuga Maru?

A. Before the war or after the war, sir?

Q. After the war.

(Testimony of Jiromatsu Kagimoto.)

Mr. Collins: May I ask the object of that question?

Mr. Quinn: Yes. I think it might serve to refresh the recollection of this witness as to other sampans that have similarly stayed afloat after they have had a hold full of water.

Mr. Collins: Well——

The Court: It ties into your question of the same nature, a boat bearing that name after the war.

Mr. Quinn: Did you get the question?

The Interpreter: He says if that was the boat that was lost and owned by "Bull" Haines; is that it?

Mr. Quinn: That is the boat I refer to. [139]

The Interpreter: He seen the boat and he heard about the boat.

Q. (By Mr. Quinn): What happened to that boat, Mr. Kagimoto?

Mr. Collins: Your Honor, I object to that question unless there is some evidence brought out to show that this witness has any first-hand information in connection with that. If he has only heard people talking about it, I think it would be hearsay of the rankest order.

The Court: Yes, I think first we should know if he does know of his own knowledge.

Mr. Quinn: I think, your Honor, he just said he has heard about it and has seen the boat. I believe that was the recent answer there.

(Testimony of Jiromatsu Kagimoto.)

The Court: Heard about what? And saw it when? After something happened to it?

Mr. Quinn: That is what I would like to find out.

The Court: Well, I know you are having difficulty. Let me ask this question and see if we can get ahead. Well, will you read the question again.

(Question read.)

The Court: If you know.

The Interpreter: Well, he said he don't see the boat around and he thinks he read in the paper that it was lost at sea. [140]

Mr. Quinn: No further questions.

Mr. Collins: No questions.

The Court: You are excused. Thank you very much.

(Witness excused.)

The Court: Next witness.

Mr. Quinn: Mr. Matsumoto.

### YOSHINOBU MATSUMOTO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Are you left-handed?

The Witness: Yes, I am left-handed.

The Court: What is your name?

The Witness: Yoshinobu Matsumoto.

The Court: How old are you?

(Testimony of Yoshinobu Matsumoto.)

The Witness: Twenty-seven.

The Court: Do you live here in Honolulu?

The Witness: Yes.

The Court: What is your occupation?

The Witness: Carpenter.

The Court: Employed by someone?

The Witness: Yes, right now I am employed by Pacific Construction Company.

The Court: And you are a citizen of the United States?

The Witness: Yes. [141]

The Court: Only?

The Witness: Only.

The Court: Take the witness.

#### Direct Examination

By Mr. Quinn:

Q. Mr. Matsumoto, where were you employed in 1945?

A. I was employed by the San Francisco Commercial Fishing Company and Salvage Company.

Q. San Francisco Commercial Fishing—

A. Commercial Fishing and Salvage Company.

Q. Have you ever been employed in the business of building and repairing boats?

A. That was the business for this Company were building and repairing.

Q. That was the business for that Company. For how long had you been engaged in that sort of occupation?

A. At 1945, or at present? You mean in 1945?



(Testimony of Yoshinobu Matsumoto.)

Q. Yes.

A. In 1945 it was about ten years.

Q. Ten years? A. In 1945; started in 1935.

The Court: You yourself had worked at it for ten years?

The Witness: Yes, because the family has a business and we work off and on. [142]

Q. (By Mr. Quinn): Is that the business known as the Ala Moana Work Shop?

A. At present it is.

Q. At present it is known as that. Are you familiar with the vessel known as the Tenyo Maru?

A. Yes.

Q. Did you ever do any work on the Tenyo Maru?

A. Yes, in '45 we did considerable work on it.

Q. Can you give us some idea of the nature and extent of the work that you did at that time?

A. Well, repairing the sides and bottom of the ship, you know, and putting a new cabin on it.

Q. Would you say it was a major repair job?

A. It is a major repair job.

Q. When you completed that job——

Mr. Quinn: Strike that.

Q. (By Mr. Quinn): In your connection with the building and repairing of boats, did you find it necessary to be able to judge whether a boat was staunch and sound or not? A. Yes.

Q. In your opinion, upon completion of the work which you did, was the Tenyo Maru staunch and

(Testimony of Yoshinobu Matsumoto.)

sound? A. Yes, we have to in order to——

Mr. Collins: Your Honor, that question is very indefinite as to time. I don't believe—— [143]

The Court: 1945.

Mr. Collins: Well, he said after the work was completed.

Mr. Quinn: I meant immediately after. I am sorry.

The Court: Go ahead.

The Witness: Yes. We had to be able to make it seaworthy in order to let it get out of the shop. After all, the life of the fisherman depend on it.

Q. (By Mr. Quinn): Can you give me any idea of the extent of repairs which you performed in terms of the money that was charged for the job?

A. Well, I can't say off-hand how much it cost, but at that time I think it was—cost about four to five thousand dollars, somewhere around there, because we had it on dock for a little over a month, and work on it every day.

Q. In your capacity as a builder and repairer of boats, Mr. Matsumoto, have you had occasion to keep track of the market value of boats of this type as they are passed from buyer to buyer?

Mr. Collins: Your Honor, I object to that question. If this man is engaged as a carpenter, I don't believe he could be qualified as an expert on the market value of boats, unless he is shown to be actively engaging in that type of work. Carpentry would not call for that.

(Testimony of Yoshinobu Matsumoto.)

The Court: I think you have jumped a little bit afield. [144]

Mr. Quinn: If the Court please, I have asked him if, in his capacity as a boat builder and repairer, he found it necessary to keep informed of market values. Let the answer come first and then if Mr. Collins wants to challenge his expertness, even though he does keep track of them, we might have a question, but I see no objection to that question as asked.

The Court: He may answer this one.

The Witness: I can't say, because at that time I was just a carpenter working, but I can say, well, the market at that time on ships was quite high all around. They can't get material to build a boat.

Q. (By Mr. Quinn): I think you can stop right there. Your answer is you did or did not have an opportunity and find it necessary to keep track of the market of boats?

A. Well, I knew how much they selling at at that time, certain boat.

Mr. Collins: That has been answered, your Honor. I think if we struck the portion after he had stated that he had not, that would keep the record in a more satisfactory state.

The Court: Will you read his first answer.

(Answer read.)

Reporter: (Reading) "I can't say, because at that time I was just a carpenter working . . ."

(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: My motion is to strike from that point [145] on.

The Court: Well, from that point on I would disregard it. I gather that his answer is in 1945 he was just a carpenter and didn't keep track.

Mr. Quinn: There was inference to that effect. I just wanted to get it "yes" or "no."

The Witness: Yes.

Mr. Quinn: His answer is, he means he did not know the market value of boats at that time.

The Witness: Not exactly that, but I mean I knew how much they were selling about in general was quite high. That is all I can tell you.

Q. (By Mr. Quinn): Since 1945, what have you been doing?

A. Well, I got in the Army, got discharged and started going back—because the family took over the shop again.

The Court: What kind of a discharge?

The Witness: Honorable discharge.

The Court: Say so. This is your opportunity to tell what kind you got. When you have occasion to mention your discharge, tell the world what kind of a discharge you got.

Q. (By Mr. Quinn): Have you done any boat building or repairing since that time?

A. Yes, since last year—no—February of 1947.

Q. How many boat shops in town, if you know, do any work on sampans? [146]

A. Well, there is Kewalo Ship Yard, Funai Boat

(Testimony of Yoshinobu Matsumoto.)

Shop, Hawaiian Tuna Packers, and my family shop, Ala Moana Boat Shop.

Q. What was the last?

A. Ala Moana Boat Shop.

Q. Mr. Matsumoto, do you know whether the sales of sampans are generally handled through brokers or in individual transfers from buyers to sellers?

A. So far that I know the owners and buyers, you know, prospective buyers, they transact everything, not through any brokers.

Q. Not using any brokers? A. Yes.

Q. Do the boat building shops ever sell sampans?

A. Yes, they do once in a while.

Q. Would you say if anybody were able to tell the market value of sampans that a boat builder could?

Mr. Collins: I object to that question, your Honor. It seems to be quite hypothetical.

Mr. Quinn: Well, I think it is addressed to his experience as a boat builder, if the Court please, and he is shown to be an experienced boat builder.

The Court: Well, you asked him, would you say thus and so? Thus he lifts himself by the boot straps and would be able to say.

Mr. Quinn: You mean it was a leading question? [147]

The Court: I think the question implies that he can lift himself up to the point where he can say.

Mr. Quinn: I think that is true, your Honor. I will reframe the question.

(Testimony of Yoshinobu Matsumoto.)

Q. (By Mr. Quinn): Is there anybody in the city——

Mr. Quinn: Strike that.

Q. (By Mr. Quinn): Is there any occupation that you know of in the city of Honolulu that would qualify a person to give an opinion on the market value of sampans better than a boat builder?

A. Well, I don't know, sir, that part. I think a boat builder more or less can tell whether the ship is seaworthy or not. They can check it and see whether it is poor or good. That depends on how much the owner wants to dump the ship on the market.

Q. Mr. Matsumoto, do you have an opinion as to the market value of the Tenyo Maru as of the date you completed work on the Tenyo Maru at the boat center?

Mr. Collins: Your Honor, I would object to that as being completely irrelevant. That work was completed some two years prior to this occurrence, and I fail to see what connection an evaluation as of that date would have as to its value at the time of the loss.

Mr. Quinn: If the Court please, I will grant that the value in 1945 is not conclusive as to the value in 1948, [148] but I suggest that the value in 1945 is some evidence as to what the value might be in 1948, assuming other factors are subsequently shown. I want to bring out right now whether the boat builder forms a value in 1945 at the time he is right

(Testimony of Yoshinobu Matsumoto.)

with the boat. I will then subsequently take this witness and see if he is familiar enough with the vessel, assuming that all conditions as to seaworthiness remain more or less constant, whether the value would go up or down in 1948. I will then subsequently attempt to show that the boat was kept in such repair that in 1948 it was worth—it is a fair inference to take the value in 1945, follow the market trend, and reach some value in 1948.

The Court: That would be permissible only if there was a definite showing that in April, 1948, there was no market for sampans of this sort, and even with respect to 1945, it isn't what the boat builder thinks, but it depends on whether or not in 1945 there was a market and what in his opinion this boat would have brought on the market, not its value to him as he looks at it as a boat builder.

Mr. Quinn: That is true. I asked him what he thought the market value was, because I believe it is established by his testimony that perhaps the boat builder knows more about market value—not what he thinks the intrinsic value is, but what he thinks it would bring if it were sold or could be sold.

The Court: I will allow him to answer that question [149] subject to a motion to strike. The answer will be subject to a showing that there was no market in 1948, in April.

Mr. Quinn: Very well, your Honor.

The Court: Do you understand the question?

The Witness: No.

(Testimony of Yoshinobu Matsumoto.)

The Court: In other words, when you were through repairing this Tenyo Maru in 1945—In what month?

The Witness: I just cannot tell the month. Let me think. It must have been around May.

The Court: Around May. What, in your opinion, if you have an opinion, was its fair market value at that time? Is that a fair statement of the question?

Mr. Quinn: Yes, your Honor.

The Witness: Well, I can't tell you how much it was really worth, but at that time there was quite a demand for boats, and material was pretty hard to get, and everything went zooming high in '45 and '46.

The Court: My rephrasing of Mr. Quinn's question is subject to your objection. You may have an exception to the Court's question.

Mr. Collins: May I have the answer?

(Answer read.)

Mr. Collins: No objection.

Q. (By Mr. Quinn): Was there a demand for boats in April, 1948? [150]

A. Well, people were still building boats.

Q. They were still building boats?

A. Yes.

Q. Showing you a copy of Libellant's Exhibit No. 1, which is the bill of sale for the Tenyo Maru, and which gives a description of the length and depth, and other characteristics, can you tell the



(Testimony of Yoshinobu Matsumoto.)

Court what it would take—how much such a boat would cost to build in 1948?

A. You mean just the hull or the complete——

Q. Complete new boat.

The Court: With engine?

The Witness: Engine equipment and everything?

The Court: Tackle.

The Witness: Gears. Well, as far as I know, in 1948 about a 48-foot sampan usually runs up about fourteen to sixteen thousand dollars. That is the hull alone. Other than that you have to get engine and gears. That part you have to get from hardware stores.

Mr. Collins: We can't hear very well down here, your Honor. I wonder if you will instruct the witness to speak a little louder. May we have the question read?

The Court: Yes.

Mr. Collins: I mean, may we have the answer read?

(Answer read.)

Q. (By Mr. Quinn): Are you familiar with market conditions [151] of sampans of that type in the year 1948? A. Well, I don't know.

Q. I can't hear you.

A. I said I don't know in 1948, because I was not in touch. I was out of the line already.

Mr. Quinn: No further questions.

The Court: Cross-examination?

(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: I move that all of the testimony concerning the value be stricken, your Honor.

The Court: What is that? I haven't heard any.

Mr. Collins: The testimony with respect to the value of the hull and new hull in 1948.

The Court: Well, I haven't accepted that because he was asked for the market value and he was giving us the value of parts.

Mr. Quinn: If the Court please, I asked him at that time replacement costs.

The Court: Yes, complete.

Mr. Quinn: In other words, what would it cost to give you a complete sampan. He was unable to do so, but he said the hull would cost fourteen to sixteen thousand dollars, and then, in addition, you have the hardware, which would cost so much more. I think that that ought not be stricken. That is perfectly relevant, the cost as of the date of this accident.

The Court: Well, maybe I haven't paid much attention [152] to it because it was not a complete answer to your question. Do you want it stricken?

Mr. Collins: Yes, your Honor, I do. I believe the condition under which the evidence was submitted originally was the establishment of the fact that there was no fair market value as of the time of the accident.

The Court: Well, that is the objection I expected you to make when he asked for reproduction costs, but I didn't hear it.

(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: I was waiting for his testimony to be completed and then ask that everything be stricken because he has testified he was not familiar with the market. But presumably there was a market at that time.

The Court: Well, I am going to let it stay in for such as it is worth. Frankly, I haven't even written it down, but I will do it now. Have you any questions of this witness?

Cross-Examination

By Mr. Collins:

Q. Had you any contacts with the Tenyo Maru after it left the shipyard in 1945?

A. Well, after we launch it, well, we had to calk it for some slight leak; we had to re-calk it again.

Q. When was the last time?

A. They had shake-down crews, and when it comes back, they tell us where it was leaking, and check it. [153]

Q. That was in 1945, too?           A. Yes.

Q. You haven't done any work since 1945?

A. No, I haven't done any work.

Q. You have had no occasion to go over the ship?

A. No.

Mr. Collins: That is all.

Mr. Quinn: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Quinn: If the Court please, if Mr. Collins will permit me, I would like to call Mr. Cho again for a couple of matters.

Mr. Collins: No objection, your Honor.

The Court: All right, Mr. Cho.

### JOHN Y. K. CHO

recalled as a witness on behalf of the Libellant, having been previously duly sworn, was examined and testified further as follows:

The Court: I remind you that you are still under oath.

#### Redirect Examination

By Mr. Quinn:

Q. On what date did you acquire the Tenyo Maru, Mr. Cho? [154]

A. It was in August, 1945—'46, excuse me.

Q. 1946. I believe you testified that from that time until the loss of the ship, you were sending it out on fishing trips once or twice a month.

A. Yes, sir.

Q. Can you tell the Court what sort of repairs and upkeep the Tenyo Maru was given during that time?

A. Well, I have to take it to Tuna Packers and have the bottom repainted; sometimes have to repairs on the bottom, like that, like fish holes and things like that. I have them paint all that, and sometimes the sponson, have them fix the sponson, but it is always necessary to send the boat up be-

(Testimony of John Y. K. Cho.)

tween three to five months, you see, and up once dry dock.

Q. Did you send it up regularly every three to five months from the time you got it until the time it was lost?      A. Yes, sir.

Q. As a general practice, when you would put the boat in the custody of Tuna Packers, what instructions would you give Tuna Packers with respect to the repairs?

A. They would take the boat up; then whatever damages there were, if there were any, more or less the guy on the yard, Moore, they told him, he does all the figuring and what kind of repairs that is necessary. If there is any that he miss, we can tell him what it is and he will do it for us, or if he find anything wrong with it with his own eyes, he will tell us [155] that it has to be repaired and he does it.

Mr. Quinn: I believe that is all.

#### Recross-Examination

By Mr. Collins:

Q. Do you know how old the Tenyo Maru is, or when it was built?

A. The Tenyo was built in 1921.

Mr. Collins: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Quinn: If the Court please, I am going to

have to beg the Court's indulgence. I issued a subpoena the other day for a person whom I considered to be qualified to speak on the market value of this vessel, and it was only this morning at 8:30 that the Marshal advised me—of course, I think I might have gotten it into his hands fairly late—that he had gone to Hawaii between the time the praecipe was issued from our office and the time the Marshal was able to get there to serve him. Therefore, I would like to beg leave—since it is the hour—to put on the evidence of value at the next session, if there is to be such, and I presume there will have to be.

The Court: Other than that you are through?

Mr. Quinn: Other than that, I believe I am finished.

The Court: Who was this person?

Mr. Quinn: This was A. G. Funai, of the Funai Boat [156] Shop, who was the builder of this boat.

In the meantime, during noon—I don't know when Mr. Funai will be back, but during noon I checked around at some length, and we have found someone who I believe is qualified to testify, but he stated that he wanted some time to investigate the qualities of the vessel.

The Court: I don't know why this should be so difficult. Here some months ago we had a Chinese Junk, and we couldn't find anybody around here to testify as to its market value, but I thought when we came to sampans, they are bought and sold with sufficient regularity that you shouldn't have much difficulty.

Mr. Quinn: They are not bought and sold through experts, your Honor. That is the trouble. It is from customer to customer, or friend to friend, and one person to another, and whatever bargain he makes, that is the price for that boat, and it has no bearing on the next one.

The Court: Tuna Packers ought to have experts down there, hadn't they?

Mr. Quinn: We went to see them and we weren't able to get any expert opinion on the matter.

The Court: They come in here when some boat doesn't pay its bill.

Mr. Quinn: At any rate, your Honor, I believe I can produce evidence in the next hearing, but I would like to stop [157] for today.

The Court: Yes, we have been laboring rather diligently for the past hour. Tomorrow morning at 9 will you be ready?

Mr. Quinn: I certainly will scramble and try to be, your Honor, and I think I probably can.

Mr. Collins: I might say, your Honor, if it will help matters at all, the Libellee will be happy to go on the first thing in the morning, if Mr. Quinn's witness is not available.

Mr. Quinn: That is what I was hoping would be the situation, because I think the case, besides the evidence on value, for the Libellant is in.

The Court: All right. Tomorrow morning at 9.

(Thereupon, at 3:55 p.m., the hearing in the above entitled matter was adjourned to 9 a.m. the following morning, April 26, 1949.) [158]

April 26, 1949

The Clerk: Admiralty No. 409, John Cho vs. The Tug "Kolo" for further trial.

The Court: Are the parties ready?

Mr. Quinn: Ready for the Libellant.

Mr. Collins: Ready.

The Court: Mr. Quinn, are you going to be able to proceed this morning?

Mr. Quinn: I am, your Honor.

Call Mr. Leary.

### ROBERT T. LEARY

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Court: Will you state your name, residence, age, occupation, and citizenship.

The Witness: Robert T. Leary; 29 years of age; residence, Honolulu; occupation, Coast Guard officer.

The Court: And you are a citizen of the United States?

The Witness: Citizen of the United States.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.



(Testimony of Robert T. Leary.)

Direct Examination

By Mr. Quinn: [159]

Q. Mr. Leary, do you have any other occupation besides that of Coast Guard officer?

A. Yes, I am also vice president and general manager of Child's Marine, Ltd.

Q. What is Child's Marine, Ltd.?

A. Child's Marine, Ltd., is a yacht marine brokerage firm, sells marine insurance, does marine surveying.

Q. For how long have you been with Child's Marine?

A. I have been with Child's Marine since March of 1946. I am a reserve officer, and they called me back on active duty at this time. That's why I am Coast Guard.

Q. Did you have any experience with boats before March, 1946 in any capacity?

A. Yes, my experience with boats started in about 1934.

Q. Was that as a boat operator?

A. Boat operator on small boats. I was mate on a sailing ship around the World, and as skipper of Naval vessels, and so on.

Q. Are you actively engaged in the surveying, which you said that Child's Marine, Ltd. does?

A. Yes, I do practically all of the surveying, or at least check them out and sign them all before they go out.

Q. What do you mean by a "survey"?

(Testimony of Robert T. Leary.)

A. Those are surveys for marine insurance, appraisals for the banks, discount corporation, and special surveys if [160] people just want valuation on their vessels, want to know whether they are worth while fixing up, etc.

Q. Have you also had experience in the buying and selling of boats?

A. Our experience in the buying and selling of boats is purely from the brokerage standpoint. We do not buy and sell ourselves.

Q. You represent either the buyer or seller, or both, in transactions?      A. Or both, yes.

Q. In connection with your position with Child's Marine, have you found it necessary to keep familiar with the market value of boats, as time goes on?

A. That is our primary job is to know market values and be able to advise both purchasers and sellers and to advise the banks and insurance companies.

Q. In that connection have you had occasion to remain familiar with the market values of sampans in the Honolulu area?

A. I have followed that quite closely.

Mr. Quinn: May I have the exhibit, please.

(Document handed to Counsel.)

Q. (By Mr. Quinn): Mr. Leary, I hand you Libellant's Exhibit No. 1, which is a bill of sale of a vessel known as the Tenyo Maru, and which is

(Testimony of Robert T. Leary.)

on a Bureau of Customs form, with [161] which I think you are familiar, which gives a description of a sampan.

Have you read the description, Mr. Leary?

A. Yes.

Q. Now, Mr. Leary, if a sampan of that type, such as described in Exhibit 1, were given a major overhaul in 1945, so that its deckhouse was repaired and a considerable number of ribs and planking were replaced, with a total repair cost of from four to five thousand dollars, can you give us your opinion of the market value of that vessel in April, 1948?

Mr. Collins: If your Honor please, I object to that question. If this is an attempt to evaluate the sampan in question as of the date of the accident, a consideration would have to be given to its condition as of that date, and not merely its theoretical age, or the work that had been done two or three years previous thereto.

Mr. Quinn: I believe, if the Court please, I left out an essential element in that question. I think Mr. Collins is calling my attention to it.

Q. (By Mr. Quinn): And, Mr. Leary, keeping in mind the factors I have just given you, and adding to them the fact that from August, 1946 until April, 1948 the sampan was placed in dry dock every three to five months, and when it was in dry dock such repairs as were found to be necessary

(Testimony of Robert T. Leary.)

were accomplished, with that added fact I ask your opinion of the value [162] of the vessel in April, 1948.

Mr. Collins: If your Honor please, I must again object. We are attempting to evaluate a vessel that has been on the reef for a period of days, and I submit that a question which does not take that into consideration does not evaluate the one in question.

Mr. Quinn: If the Court please, I think Counsel is being a little picayunish at this point. We are entitled to have the market value of the vessel not damaged as of April, 1948, from which can then be taken the value of such damage as was done on the reef.

The Court: Well, so long as it is distinctly labeled the "before value," as indicating its market value before the accident which occurred by the vessel's going on the reef; then later describing what happened to it and the "after value," so we can then find out what the value was as of the time it was cut loose.

Mr. Quinn: Yes, your Honor. I believe, however, that I am entitled to the market value of a vessel as a going vessel, less the cost of repairs, not the market value of a vessel which needs repair. I think there is a difference.

The Court: Well, we can get to it that way, but actually the thing we are interested in is the market value of the vessel at the time it was cut from the tow; what was the value of the thing that was lost at the time it was lost. [163]

(Testimony of Robert T. Leary.)

Mr. Quinn: Well, that is correct.

The Court: Maybe you can get at it by finding out the "before value," plus the other features, with the understanding that you are going to follow it up.

Mr. Quinn: Yes, your Honor.

The Court: I will allow this. Do you have the question in mind?

The Witness: No.

The Court: Would you like it read to you?

The Witness: I assume I am to appraise the vessel built in 1921, generally rebuilt in 1945, and I assume that she was never—she wasn't one of those sunk at Kapalama Basin or allowed to deteriorate.

The Court: You mean those the Military Governor took?

The Witness: Yes.

The Court: Was she one of those?

Mr. Quinn: It was not. And as far as the evidence is, it was rebuilt in 1945 and every four or five months put in dry dock.

The Witness: She was in fishing operation, I take it, normal operating condition?

Mr. Quinn: Yes. The evidence is that she was used approximately twice a month for fishing voyages that might last as long as fifteen days. [164]

The Court: That goes into the question?

Mr. Quinn: Yes, if the Court please.

(Testimony of Robert T. Leary.)

The Witness: You don't wish me to take in consideration any damage; I take it she was ready to go to sea.

The Court: We want from you now the facts that were given you in that question; namely, the value of any vessel such as was described before it met with any accident which brought about this suit.

The Witness: My valuation on that—being unable, of course, to see the vessel—I don't remember from having seen it at any time—would be between eight and nine thousand dollars. I think that is as of April, 1948. That would not be a present day valuation. I think that I would be unable to pin it down much closer than that through the variable factors.

The Court: I noticed in the question, and I think of it now, that nothing was said as to the kind of a motor the vessel had.

The Witness: That is in the——

The Court: Oh, it is in Exhibit No. 1?

Mr. Quinn: Yes.

The Witness: It is in here.

Mr. Quinn: That gave the dimensions of the vessel and the type of power.

The Court: So your "before value" is between eight and nine thousand dollars in April, 1948?

The Witness: In April, 1948.

Q. (By Mr. Quinn): Mr. Leary, are you familiar with the cost of repairs to vessels? Have you

(Testimony of Robert T. Leary.)

had occasion to determine how much damage has been done to a particular vessel in connection with your survey work?

A. Our survey work does not take that—in other words, we don't act as adjusters as a rule. The insurance companies usually get their own adjusters who go around and get estimates. I really could not qualify as an expert on marine adjusting.

Q. In connection with your work with Child's Marine have you had occasion to act as agent for boat owners who sought to have repairs made to their vessels? A. Yes, we have.

Q. And in connection with that experience, have you been familiar with the charges made by boat repair people for particular types of work which they do? A. Well, a limited degree, yes.

Q. How limited?

A. Well, our occasions to have a boat repaired for an owner, I would say, not more than several a year at the most.

Q. Well, in boats that is fairly many, isn't it, Mr. Leary?

A. Well, it keeps us somewhat in touch. We are not completely ignorant. The new boat costs we follow quite closely; the repair costs, follow that somewhat. [166]

Q. Now, Mr. Leary, if the sampan, the characteristics of which you have just examined, had been on the reef for two or three days, as a result of which it had received a battering on the port side

(Testimony of Robert T. Leary.)

in about the middle, below the water line, resulting in a leaking in an area of about a foot and a half long, through which the water was coming in sufficient amount that pumps were required to keep up with the amount of water coming in, can you give us an opinion as to the cost of making repairs of the planking necessary to make the vessel seaworthy again?

A. It would depend how large an area was actually chewed or splintered.

Q. I believe the evidence is that it was about a foot and a half long.

A. Over how wide a section?

Q. Three or four inches wide.

A. I take it that was on one strait, or did it go to several straits; on one plank or several?

Q. Well, it was testified that it went more or less horizontal. I presume that you should, for purposes of this opinion, take the maximum planking consistent with a horizontal type of abrasion.

A. Was there any damage to frames or to the keel?

Q. None testified to.

A. And I take it that the vessel had excessive water in [167] it; or was machinery damaged? Does that have to be taken into account, or just the hull?

Q. Just the hull is all the damage that is shown, Mr. Leary.

A. I would estimate, quite rough—I take it that



(Testimony of Robert T. Leary.)

this vessel would be hauled to Tuna Packers or a similar yard.

Q. Or a similar yard, yes, that is correct.

A. I would estimate that the entire job would probably run around six hundred, six hundred fifty dollars, if it is as I picture it.

Q. In your experience, Mr. Leary, would you say that a vessel which had such a wound in its hull and which was taking water so that pumps were required was a seaworthy vessel?

A. I think that would depend entirely on the degree to which she was taking water. The vessel would remain seaworthy up until the point where you could no longer handle it with the pumps and her stability was partially destroyed. If you could keep the bilge dry with the pumps and the pumps were properly working and continued to work, she would remain seaworthy, provided she was not structurally weakened so that she twisted and strained other sections.

Q. Mr. Leary, would the characteristics of a vessel with such a wound in her hull——

Mr. Quinn: Strike that, please.

Q. (By Mr. Quinn): Would it be anticipated that such [168] an area in the hull might allow more water in in rough water than it would in a protected harbor?

A. That is very possible. There are several kinds of damage where the action of the rolling of the vessel might allow more water in due to the pres-

(Testimony of Robert T. Leary.)

sure of the vessel rolling around and squirting in, where otherwise it would come in under less pressure.

Q. Are you quite familiar with the operating characteristics of a vessel such as a sampan?

A. Yes.

Q. In your opinion, will a sampan, with its decks awash, with the water up to the cabin, and with about three or four feet freeboard in the bow, sink, assuming that the fuel tanks are about half full and that there is no load?

A. All compartments flooded?

Q. All compartments flooded.

A. To the best of my knowledge and from the experiences that we have had with sampans flooded, they do not normally sink. They will remain awash.

Q. Now, is that true irrespective of wind and sea conditions?

A. That is correct, because it is considering it as a submerged object, and there is practically nothing showing; the waves can wash over and she may submerge a bit, but she would normally rise again until she was awash in the troughs. [169]

Mr. Quinn: No further questions.

#### Cross-Examination

By Mr. Collins:

Q. Mr. Leary, if a sampan has been sitting on a reef for two or three days, is it possible to determine the damage that has occurred to that except

(Testimony of Robert T. Leary.)

by making a thorough inspection of the hull inside and outside?

A. I would say that you would have to make a fairly thorough inspection to tell just where the damage might lie.

Q. It is possible, in other words, if a sampan was sitting on a reef, that some of the framing might be fractured, although not observable from the main deck; is that correct?

A. It would not be observable from the main deck. Most sections of the vessel, or a good portion, you could observe it from the interior.

Q. And, similarly, there might be weakening of the planking that could not be determined until tests were made on it; is that correct?

A. There might be, yes.

Q. Then your estimate of six hundred to six hundred fifty dollars as the repair bill for damage of a fracture of about a foot and a half by about three or four inches is based purely upon an injury of that nature confined to that area, presuming that the rest of the hull is in good condition?

A. That is correct. No split frames or damage to sea [170] connections or other damage than just to the planking, figuring the length that you would have to carry out in order to safely put in a piece of plank.

Q. And if the engine or the motor of this sampan was completely inundated, would that increase the repair bill?

(Testimony of Robert T. Leary.)

A. It would increase it appreciably, yes.

Q. And you say if a sampan was taking in water, that it is rather difficult to determine whether it is seaworthy or not seaworthy without having inspected the ship and seeing the actual condition that it was in?

A. That is correct. You can tell, as a rule, where the vessel is taking in water. It would depend how thoroughly it was inspected from the inside.

Q. As a practical seaman, you would hesitate to give the opinion of the seaworthy character of a vessel if you had not observed it yourself?

A. Yes, sir, it would be very hard to say without actually seeing it. I have to use somebody else's description.

Q. Yes. Did I understand you to say, in effect, that you do not know of any sampans that have sunk in these waters?

The Court: He didn't say that.

The Witness: Not in so many words.

Q. (By Mr. Collins): When you expressed the opinion that sampans do not normally sink, is that based upon an experience or lack of knowledge of any sampan sinking? [171]

A. That is based upon the experience of several sampans which have become totally flooded and have not sunk.

Q. Do you know of any sampans that have sunk?

A. I don't know of any sampans that we are

(Testimony of Robert T. Leary.)

sure have sunk. Some of them are reported to have sunk, but the term is used generally—most people will consider when a vessel is flooded that she is sunk. That word is used. There is only one case that I am particularly familiar with where a vessel was reported sunk, and we are sure that she completely submerged; we know she flooded and filled.

Q. Well, would you be willing to express an opinion to the effect that a sampan could not sink?

A. I would be willing to express an opinion that from the experience I have had around here with sampans and following their losses and what not, that they do not appear to sink. That is the best knowledge that we have. They do not normally sink when flooded.

Q. But you wouldn't throw out the possibility of their sinking?

A. That would be—there could be, possibly, conditions under which a sampan might go right on down. There is definitely a problem there of ballast and buoyancy material—buoyant material in the hull; there would be a point at which she would go down; if a heavy enough engine were put in a boat, why, no amount of wood would keep it afloat. That is not [172] normally the case with our Hawaiian sampans, however.

Q. In your estimated figure of six hundred to six hundred fifty dollars for the repair of the planking that was described to you, that would, of

(Testimony of Robert T. Leary.)

course, not include any items of repairs that might occur to other parts of the ship than the hull itself?

A. I am figuring in that the pulling her up on the wharfs, replacing that section of planking damaged, which in this case is quite small, recalking, cementing the seams, and painting that section, and putting her back in the water. It does not include paint job or any other item than just repairing that section and putting her back, if she were not damaged anywhere else.

Mr. Collins: That is all.

Mr. Quinn: I have no further questions.

The Court: All right, you are excused.

(Witness excused.)

Mr. Quinn: That is the case for the Libellant, your Honor.

The Court: Very well. Does the Libellee wish to make an opening statement?

Mr. Collins: If your Honor please, the position of the Libellee in this matter is that the tow that was undertaken was undertaken completely without the authority of the owner of the tug; that beyond that it was known by the owner of the [173] sampan, the tow, that the tow was being undertaken without the authority of the owner; that any condition with respect to the seaworthiness or unseaworthiness of the tow was equally known by both the tug master and the owner of the tow.

We contend, therefore, that there is no liability, because the acts done by the captain of the tug were beyond his authority, were known to be such; likewise, that if it should be found that such is not the fact, the condition of the vessel being what it was, the accident that occurred was a result, not of the negligence of the tug master, nor of the crew of the tug, but was rather due to the negligence of the owner of the vessel in improperly manning and in improperly equipping it, and permitting it to go out in the condition that it was in.

The Court: Call the first witness.

Mr. Collins: Mr. O'Neill, please.

### RICHARD O'NEILL

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Court: Please state your name, age, residence, occupation, and citizenship.

The Witness: Richard O'Neill, 412028 Mohala Way, Honolulu, T. H.; employed by Young Brothers, Ltd., 221, as dispatcher.

The Court: You are a citizen of the United States?

The Witness: Citizen of the United States, sir.

The Court: Exclusively?

The Witness: Exclusively.

(Testimony of Richard O'Neill.)

Direct Examination

By Mr. Collins:

Q. What was your position or occupation on or about April 4, 1948?

A. Relief to the port captain at Young Brothers, Captain William Pavao.

Q. Were you on duty on that day?

A. On Sunday, April 4, yes, sir.

Q. Did any event occur on that day in connection with the Tenyo Maru?

A. I had a telephone call while on duty at around 4 o'clock by a lady stating that there was a sampan on the reef in Molokai; and I told them there was nothing to be done at that time. But they were coming down.

Later, Mr. Cho, and whom I found out later the lady was his sister, came down and asked in regard to the Tenyo Maru. I immediately called Mr. Harrison, because any salvage jobs or any outside tows are under the jurisdiction of the head of the organization, sir.

I asked Mr. Cho and his sister at the time approximately where. They did not know definitely too much information on it at the time, sir. I spoke to Mr. Harrison, and Mr. Cho spoke to Mr. Harrison by 'phone. [175]

After that conversation, Mr. Harrison called for me back on the 'phone, at which time I told them there would be nothing dispatched from Honolulu that day, sir.

Q. Who was present in the office at that time?



(Testimony of Richard O'Neill.)

A. I was in the office at the time when Mr. Cho and his sister came in, sir.

Q. Was anybody else there?

A. Not that I recall, sir.

Q. During the entire conference, no one else was present other than the people which you have mentioned?

A. If—after I had completed the conversation, they were beginning to leave, sir, we had one launch operator on duty came in, sir, to make out his log, sir.

Q. Who was that?           A. Joe Kahiapo.

Q. Was he present during any of the conversation?           A. Not to my knowledge, no, sir.

Q. Have you any recollection of Mr. Kahiapo's making any statements at all there at that time?

A. No, sir, not pertaining to the sampan at all, sir. He was making his logs and ready to leave, sir.

Q. Did you have any further conversation with Mr. Cho or his sister, other than what you have related?

A. No, sir, I did not, sir. It was left entirely up to anything to be done would have to be decided the following [176] morning, sir.

Q. Did you give any instructions to Mr. Kahiapo in their presence?           A. No, sir, I did not.

Q. Did you give any instructions to Mr. Kahiapo?           A. No, sir, I did not.

(Testimony of Richard O'Neill.)

Q. Did you have any further contact at any time with Mr. Cho?      A. No, sir.

Q. Or with his sister?      A. No, sir.

Mr. Collins: That is all.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. In other words, you didn't know what arrangements were being made with respect to the sampan off Molokai?

A. No, sir, I did not have the final "yes" as to any disposition of it at all.

Q. I didn't ask you that, Mr. O'Neill. Did you know what arrangements were being made?

A. There were no arrangements made at that time, sir.

Q. Did Mr. Cho ever come back to Young Brothers, to your knowledge?

A. He did not speak to me if he did, sir. [177]

Q. Do you know whether or not the following day, as a result of the visit of Mr. Cho and his sister a tug was sent up to Kaunakakai?

A. I was not on duty in the morning, sir. I came on duty after 12 o'clock that day, sir.

Q. So you don't know whether any tug went up to Kaunakakai the next morning?

A. The only tug I would know anything about was the pineapple tug that I knew was scheduled to go up, sir.

(Testimony of Richard O'Neill.)

Q. And where was that scheduled to go?

A. To Kaunakakai.

Q. That is where they took a pineapple barge out, is it?

A. Yes, sir, Island of Molokai.

Q. Isn't that at the harbor of Kolo?

A. There is one goes into Kolo, one into Kaunakakai, sir.

Q. Did you have a usual routine of sending one to Kaunakakai every Monday morning?

A. The large tug went to Kaunakakai, yes, sir.

Q. But as far as you know, there were no arrangements made at any time for either of these pineapple tugs to see this sampan on the reef?

A. I had—I know of no knowledge to that effect, sir.

Q. You have no knowledge to that effect? [178]

A. No, sir.

Q. And when you talked to Mr. Harrison, what was the substance of your conversation on the telephone?

A. Merely stating that there were people there at that time that had a tug in distress, sir, and asking whether or not we would dispatch any assistance or anything to them at all, sir. And the question came up—Mr. Harrison asked me about the Coast Guard. And I found out from the owner that the Coast Guard had looked, and due to no danger of life aboard, there was nothing they could do.

(Testimony of Richard O'Neill.)

Q. What did Mr. Harrison say?

A. He said if anything at all would be done, they would talk it over tomorrow morning, sir, at which time I was not on at the boat house.

Q. In other words, you did not talk it over with Mr. Harrison?

A. I did not speak to Mr. Harrison, no, sir.

Q. Did you have any conversations with Mr. Harrison at all with respect to this salvage job?

A. No, sir.

Q. What were your duties as relief to the port captain?

A. Assistant to the port captain and relieve him in long hours' duty during the day, sir.

Q. Do you keep track of the location of your tugs at all times? [179]

A. Yes, sir, there is a log. We check the logs each day when they return, yes, sir.

Q. You know where they are going before they go, don't you?

A. The port captain does, yes, sir.

Q. But the assistant port captain doesn't?

A. Well, you check the logs after the boats have left, yes, sir.

Q. Were you on any long hours Monday?

A. Monday, no, sir. I was not on exceptionally long. I came down approximately 12 o'clock. I don't recall the exact hour I left the boat house.

Q. Did you check the log?

(Testimony of Richard O'Neill.)

A. The boat had not returned, sir. His log wasn't in.

Q. You had no information as to records where the boats were going?

A. Only from the dispatch slips, sir.

Q. When do your boats get back from pineapple trips?

A. All depends on when they finish picking, sir.

Q. When they finish what?

A. Picking pineapple.

Q. Picking pineapple?                      A. Yes, sir.

Q. They go on Monday and wait until the pineapples are picked, and it might be Tuesday or Wednesday before they get [180] a barge?

A. Usually their barge is there one day, sir. When I said all depends on time of arrival would be the time of departure from Molokai, sir.

Q. Is it not true that there was a usual routine for a set day for a tug to go to each of these harbors?

A. Depends on whether the cannery here is running, sir. The pineapple season varies; at times they pick every day; at different times it is once a week, maybe.

Q. Isn't it true that there was a usual routine of sending tugs up on a particular day of the week to each of those harbors?

A. If designated they were picking pineapple in that port that day, yes, sir.

(Testimony of Richard O'Neill.)

Q. But there was not a set day every week?

A. No, sir, there is definitely not a set day in the pineapple season, sir.

Q. So, when did you receive word that these tugs were supposed to go up to the pineapple barges on Monday?

A. They were scheduled to leave Monday evening.

Q. They were scheduled to leave Monday morning; and that schedule was prepared when?

A. Beg pardon?

Q. That schedule was prepared when?

A. Friday or Saturday of the week before. [181]

The Court: Excuse me. He said Monday evening and you said Monday morning.

Mr. Quinn: Excuse me.

The Court: If it makes any difference.

Q. (By Mr. Quinn): What time did you get on duty Monday? A. Twelve o'clock.

Q. Noon? A. Yes, sir; 12 noon.

Q. And the pineapple tugs, I take it, were just ready to go up to their respective harbors?

A. The Tug Mahoe was ready to take a tow out that afternoon, yes, sir.

Q. Where was the Tug Kolo?

A. The Tug Kolo had been sent to Molokai, sir, according to the dispatch sheet.

Q. According to what? A. Dispatch sheet.

Q. For a pineapple barge job?

A. Yes, sir.

(Testimony of Richard O'Neill.)

Q. In Molokai? A. Yes, sir.

Q. Kaunakakai?

A. That I couldn't say definitely.

Q. You don't know where it was on Molokai, what Harbor, Kolo or Kaunakakai? [182]

A. I beg your pardon?

Q. Where is Kolo?

A. Kolo is approximately ten miles Honolulu side of the harbor of Kaunakakai.

Q. On Molokai?

A. On the island of Molokai, yes, sir.

Q. Was that unusual that the Tug Kolo should leave in the morning and the Mahoe in the evening?

A. No, sir, it is not particularly unusual.

Q. It is not particularly unusual?

A. No, sir.

Q. Wasn't it a departure from the schedule that you just outlined, that they usually left Monday evening?

A. I said the large pineapple tug left in the evening, sir, the big tug to tow the barge.

Q. What does the Tug Kolo do with respect to pineapple barges?

A. The Kolo relieves the large tug off shore at Kolo Harbor, because the large tug has too deep a draft to proceed into the small harbor at Kolo.

Q. So the two tugs work together?

A. Right.

Q. And the Kolo has nothing to do with any

(Testimony of Richard O'Neill.)

pineapple barges except in connection with the Mahoe?

A. Oh whichever large tug it might be. [183]

Q. Were there any other large pineapple tugs with which the Kolo was supposed to work when it went up there Monday morning?

A. That particular week, not to my knowledge, no.

Q. As a matter of general practice, when you send your pineapple tug, whichever one it may be, together with the small tug, to assist the barge, don't they travel more or less together?

A. It has been the practice at times, sir, but at that time it was deemed that the operators preferred to travel during the day on a small tug rather than in the evening, sir.

Q. It was deemed——

A. Advisable, for a matter of sleep and everything else.

Q. So, as far as you know, the Tug Kolo was ordered out to Molokai the morning of Monday morning, the fifth day of April, to await the arrival of the Mahoe the following morning?

A. Yes.

Q. Now, who talked to Mr. Harrison on the 'phone last, you or Mr. Cho?

A. Me.

Q. And at that time you say that Mr. Harrison said that if any arrangements were to be made, he would make them?

A. Correct.

The Court: Excuse me. Let me get this straight. First, you called Mr. Harrison, and during that con-



(Testimony of Richard O'Neill.)

versation [184] Mr. Cho talked to Mr. Harrison, as I understand it.

The Witness: Correct, your Honor.

The Court: Then that conversation terminated; 'phones were hung up; and as I understand——

The Witness: No, sir.

The Court: (Continuing) ——Mr. Harrison called you back.

The Witness: No, sir, the 'phone was just passed back to me, the same connection, sir. The connection was not broken.

Q. (By Mr. Quinn): So when Mr. Cho left your office, he was still looking for somebody who might help him with respect to his sampan, as far as you knew?

A. So far as I know, right, sir.

Q. Did he ask your opinion as to what he might do to get some help?

A. He asked if we could take it, and I told him I did not know definitely. I would imagine at that time—as I say, I imagine some representative of our organization would have to see the vessel or anything before we would take hold of it, sir, due to the fact that, as the Coast Guard had stated, there was no danger of loss of life aboard.

Q. Is that the standard under which you take tows?

A. Well, we don't take a tow unless someone responsible inspects it, sir. [185]

Q. I didn't ask you that. You said that——

(Testimony of Richard O'Neill.)

Mr. Quinn: Strike that, please.

I have no further questions.

The Court: Redirect?

Mr. Collins: No redirect.

The Court: You are excused.

(Witness excused.)

The Court: Next witness. We might save time by taking our 10 o'clock recess now. You can have your next witness ready.

(Recess had.)

The Court: I believe we are ready for the next witness.

### EDWARD T. HARRISON

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Court: Mr. Harrison, you have been sitting here long enough to know my identification formula.

The Witness: Edward T. Harrison, 5949 Kalaniana'ole Highway; vice president and general manager, Young Brothers, Ltd.; age 56; American citizen by birth.

The Court: Are you a citizen exclusively of the United States of America?

The Witness: Yes. [186]

(Testimony of Edward T. Harrison.)

Direct Examination

By Mr. Collins:

Q. What was your position with Young Brothers on or about April 4, 1948?

A. First vice president and general manager.

Q. On that date, April 4, 1948, are you familiar with any event that occurred? Did you have any conversations or communication in connection with the Tenyo Maru?

A. On April 4, about 4 o'clock, I was at home, and there was a telephone call from the boat house, from the assistant port captain, Richard O'Neill. He stated that there was a sampan on the reef in the channel at Kaunakakai, and that the owners were at the boat house and wanted assistance; that the Coast Guard tender had already been at the scene and refused to give any assistance because there were no lives aboard. He then turned the telephone over to a person whom I didn't know.

Q. Did that person identify himself or herself?

A. As the owner of the sampan.

Q. What conversation was had with the owner?

A. I couldn't understand—I told him we would be glad to help, but we weren't able to do it at that time, that we would look into the matter in the morning. But we didn't seem to understand each other very well, and I told him to turn the telephone back to O'Neill; and I gave him the same message, that we wouldn't do anything on Sunday

(Testimony of Edward T. Harrison.)

and not to dispatch any [187] boat, and I would be down in the morning and talk it over.

Q. Did you make any statement on that telephone call, either to Mr. O'Neill or the owner, indicating that Young Brothers would accept any salvage work in connection with the Tenyo Maru?

A. No.

Q. Did you have any further contact with the owner of the sampan on that day? A. No.

Q. Did you have any further contact with Mr. O'Neill on that day? A. No.

Q. Did you have any further conversations or communications with anyone in connection with that Tenyo Maru on that day?

A. No. I only told the family there was a sampan on the reef.

Q. On Monday, the fifth, did you have any conversation or communication with Joe Kahiapo in connection with the salvage work? A. I did.

Q. Will you state to the Court what the nature of that conversation was.

A. I had the port captain send Joe Kahiapo up to my office at 8 o'clock. He was the master of the Tug Kolo, and [188] would have been going to the port of Kolo on Monday to assist the pine barge into the harbor of Kolo on Tuesday morning.

I asked Joe Kahiapo to proceed to Kaunakakai and look over the situation, as far as the sampan was concerned, and if he could be of any assistance in taking it off the reef without injury to his own

(Testimony of Edward T. Harrison.)

vessel, he was to do so, take the sampan to the pier at Kaunakakai and secure it or beach it; but that he was to do nothing else.

Q. Did you have any further conversation with Mr. Kahiapo at that time?      A. No.

Q. Did you have any further conversation with Kahiapo prior to his return to Honolulu on Wednesday the seventh?      A. No.

Q. Calling your attention to Tuesday, April 6, did you have any discussion with any member of the staff of Young Brothers in connection with the Tenyo Maru?

A. Yes. We had a directors' meeting on Tuesday morning; and, as I came out of the directors' meeting about 11 o'clock, the port captain, Bill Pavao, said that Captain Ching Ho of the Tug Mahoe had telephoned down, and that the owner of the Tenyo Maru wanted to know how much we were going to charge to take the Tenyo Maru off the reef. I told him to tell him \$200.

He said that Captain Ching Ho had also told him that the [189] owner was very poor and probably would not have that much money. And I said, "Well, take it off and secure it, and we will settle about the money later."

Q. Was there any discussion with Mr. Pavao at that time concerning any towage to Honolulu?

A. No.

Q. Was there any discussion with anybody in your staff, prior to that time, concerning towage to Honolulu?      A. No.

(Testimony of Edward T. Harrison.)

Q. Did you have any discussion with the owner, or any representative of the owner, prior to that time, concerning towage to Honolulu?

A. No.

Q. When did you first learn that Kahiapo had taken this tow?

A. When he telephoned me Wednesday night about 9 p.m. at my home and told me that he had lost the tow in the channel.

Q. On Thursday the third did you have any discussion with the owner of the sampan concerning the Tenyo Maru? A. Yes.

Mr. Quinn: Excuse me.

The Court: On what date?

Mr. Collins: This is Thursday.

Mr. Quinn: The third?

Mr. Collins: No, that is the eighth. [190]

Mr. Quinn: Thursday the eighth.

Q. (By Mr. Collins): Will you tell the Court what the nature of that conversation was.

A. Well, Cho and a man named North came to the office; the port captain brought them up to the office. And I asked the owner who had authorized the tow, and he said that Kahiapo had. He then showed me a bill of sale to the Tenyo Maru and I took down the details of its size and power and ownership, the date it was built.

And when Cho made the statement that Kahiapo had accepted the responsibility, North interrupted and said, "That isn't right. We don't——"

(Testimony of Edward T. Harrison.)

Mr. Quinn: I am going to object to any statement of Mr. North's. I would like to catch it before it comes in.

The Court: That would be hearsay.

Mr. Collins: Yes. Omit any reference to what Mr. North said.

The Court: You can tell us that he interrupted, but don't tell us what he said.

The Witness: He interrupted.

The Court: Go ahead.

The Witness: That is all.

Mr. Collins: If your Honor please, I would like to ask a question concerning what Mr. North did say, not for the purpose of the truth of the statement that he made, but for [191] the purpose of proving that he did make that statement and the reaction of the owner to that statement. I will ask the witness if he will tell the Court what was said by Mr. North.

Mr. Quinn: I will object to any such statement as pure, unadulterated hearsay. Mr. Collins can ask, and has asked, whether Mr. North—I think that is the name—made a statement, and he can then ask what the reaction of Mr. Cho was to the statement, but there is no necessity whatsoever for bringing in what Mr. North said.

The Court: You can, without having the witness give us that bit of hearsay, repeat that which he has told us; namely, that this Mr. North, at this time that he is talking about, interrupted Mr. Cho

(Testimony of Edward T. Harrison.)

and made a statement, and then you can ask him—pick it up there and ask him what Mr. Cho's reactions were to that statement.

Later, if somebody calls Mr. North and he denies having said anything on this occasion, perhaps that is a different situation, but you can get what you want without getting what North said.

Mr. Collins: If your Honor please, I thought I was permitted to ask a question, even though hearsay, as long as the truth of the statement was not at stake. The only thing we are interested in is establishing that a particular statement was made and certain reactions were had to it.

The Court: Yes, there are situations where hearsay [192] is permissible so long as it is not offered for the truth, as you say. But I don't see any great advantage in doing it when you can here get what you want without bringing into my mind that hearsay. Once I hear it it is hard to eliminate it, even though I am sure I would. I can't see why you would have to do that when what you are after is this man's reactions.

Mr. Collins: But the reactions without the statement are worthless.

Mr. Quinn: That may be, but the statement itself is still coming in as a hearsay statement in that case. Mr. Collins is quite right that you can prove a statement without offering it for the truth of the matter asserted. You can prove, as Mr. Morgan used it time and again: A person said, "I am the



(Testimony of Edward T. Harrison.)

Pope," and not prove he was the Pope, but to prove a statement that he might be unbalanced.

This doesn't prove anything but that Mr. North made a statement, and you have already proved that a certain Mr. North said such and such, which is what you want. It is hearsay without any features that would redeem it for the purposes of this examination. I can't cross-examine Mr. North on that.

Mr. Collins: It is not a question of cross-examining Mr. North. It is a question of cross-examining Mr. Harrison as to whether Mr. North said that. After all, that is the only thing that is of consequence, whether he did make the statement. As I said, we are not concerned at all whether it is [193] a true statement or a false statement.

The Court: At the moment I can't see any necessity of taking refuge in an exception to the hearsay rule. You state your question, and I will rule on it, but I am disposed to say now that unless I find a better reason for doing it, I am simply going to limit you to getting Mr. Cho's reactions to something that Mr. North may have said, without describing what Mr. North said.

Mr. Collins: My question was directed to the witness to ask him to state what Mr. North had said.

The Court: That is a question actually pending?

Mr. Collins: That is the last question pending.

The Court: Is that correct, Miss Reporter?

(Testimony of Edward T. Harrison.)

The Reporter: (Reading) "Q. Will you tell the Court what the nature of that conversation was?"

The Court: I think you were talking to me.

Q. (By Mr. Collins): Will you state to the Court what Mr. North said on that occasion.

Mr. Quinn: I object, if the Court please, on the ground that it is hearsay and not——

The Court: Sustained, and an exception——

Mr. Collins: The objection was sustained?

The Court: Yes.

Mr. Collins: May I have an exception?

The Court: Yes. [194]

Mr. Collins: And may I make an offer of proof at this time.

The Court: Yes.

Mr. Collins: I offer to prove that this witness would have testified that Mr. North had stated that he and Mr. Cho had taken the towage to Honolulu on their own responsibility.

The Court: Your offer is denied, and you have an exception to that denial, too.

Q. (By Mr. Collins): What was Mr. Cho's reaction to Mr. North's statement?

A. Cho said, "We don't want to get Joe Kahiapo in trouble. We don't want him to lose his job, and I guess you are right."

Q. Is Mr. Kahiapo still in the employ of Young Brothers?      A. No.

Q. When was his employment terminated?

(Testimony of Edward T. Harrison.)

A. About two days after this occurrence.

Mr. Collins: That is all, your Honor.

The Court: After what occurrence? This conversation?

The Witness: After they came back in that Thursday.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. On Monday, the fifth of April, you told Kahiapo to go up there, take a look, and, if he could, tow the sampan off the reef; is that right? [195]

A. That's correct.

Q. Kahiapo was the master of the Kolo?

A. That's correct.

Mr. Quinn: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Mr. Ching Ho.

### CHING HO

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name, age——

The Witness: Ching Ho.

(Testimony of Ching Ho.)

The Court: How old are you?

The Witness: Thirty-six.

The Court: And you live here in Honolulu?

The Witness: Yes, sir.

The Court: And are you employed?

The Witness: Yes.

The Court: By?

The Witness: Young Brothers.

The Court: And are you a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively, only?

The Witness: Yes, sir. [196]

The Court: Take the witness.

### Direct Examination

By Mr. Collins:

Q. What was your job on or about April 4, 1948?

A. I am captain on the Tug Mahoe.

The Court: This is the man we have been hearing about? He doesn't look like a tug boat captain.

Q. (By Mr. Collins): Did you on Monday, April 5, make a trip from Honolulu to Molokai in the Mahoe? A. Yes, I did.

Q. In connection with that sailing, did you receive any instructions? A. Yes, I did.

Q. From whom did you receive instructions?

A. Captain Pavao.

Q. And what was the nature of the instructions?

(Testimony of Ching Ho.)

A. To take my pineapple barge to Kolo and proceed to Kaunakakai.

The Court: Speak a little louder.

The Witness: And proceed to Kaunakakai to assist the Tenyo Maru off the reef.

The Court: I didn't quite get that. Did you say Captain Pavao gave you the order to assist the Tenyo Maru off the reef?

The Witness: To see if I can pull it off the reef, yes. [197]

The Court: With your tug?

The Witness: To see whether we can do it with my tug or otherwise get the Kolo to come up and pull it off.

Q. (By Mr. Collins): Did you receive any instructions with respect to the Tug Kolo in connection with that operation?

A. What was that again?

Q. Did you receive any instructions with respect to the Tug Kolo in connection with that operation?

A. I was not to pull it off; to go down to Kolo and take the Tug Kolo to Kaunakakai and pull it with the Kolo.

Q. So your instructions were to assist the Kolo to the extent necessary; is that correct?

A. Yes, sir.

Q. And did you proceed to Kaunakakai?

A. I did.

Q. And from there to Kolo?                      A. Yes.

Q. When did you arrive at Kolo?

(Testimony of Ching Ho.)

A. That morning, Monday morning.

Q. On which day?

A. April 5. I got off Kolo at 6:30.

Q. Suppose you start from the beginning and tell us just what your operation was from Honolulu.

A. From Honolulu I was supposed to take a pineapple [198] barge to Kolo. And the Tug Kolo is supposed to meet me off Kolo to take the pineapple barge into Kolo dock, and I was supposed to proceed from Kolo to Kaunakakai.

Q. Now, when you arrived at Kolo, the Tug Kolo was there?      A. It was.

Q. And she assisted the barge in?

A. Yes, it did.

Q. At that time did you have any conversation with the captain of the Kolo?

A. He just told me he can't pull the Tenyo Maru off the reef.

Q. Well, then what did you do?      A. What?

Q. Then what did you do?

A. Then I proceeded to Kaunakakai.

Q. What did you do on arrival at Kaunakakai?

A. On arrival at Kaunakakai I talked to Cho and Mr. North up there.

Q. About what time did you arrive at Kaunakakai?

A. About nine o'clock.

The Court: Excuse me.

Q. That was on Tuesday?

A. On Tuesday morning.

(Testimony of Ching Ho.)

The Court: What was that second name? You talked to Cho and whom? [199]

The Witness: Buster North.

Q. (By Mr. Collins): Will you tell us the substance of the conversation that you had with Mr. Cho.

A. That morning I got over I asked him if he had insurance on his sampan.

The Court: Wednesday morning?

The Witness: Tuesday morning.

Mr. Collins: That was Tuesday morning, your Honor.

Q. (By Mr. Collins): Did you have any further conversation?

A. He asked me for the price of towing the sampan off the reef. I told him I had to call back to Captain Pavao in Honolulu to find out the cost.

Mr. Collins: Would you speak up a bit louder, please. Do you want the last answer?

Mr. Quinn: Yes.

(Answer read.)

The Court: Speak louder so they can hear you. I am sure when you are on your tug you can shout. Go ahead and shout out here.

Q. (By Mr. Collins): And what happened as a result of this conversation?

A. Well, at 10 o'clock I called Captain Pavao up.

Q. And what was the substance of your conversation with Captain Pavao? [200]

(Testimony of Ching Ho.)

A. I told him Cho told me that he got no insurance on his sampan, and I want to find out what it cost to pull it off the reef. He told me——

Mr. Quinn: I will object, your Honor. I think Captain Pavao is here and able to testify as to what he said himself. There is no sense giving him a right to corroborate his hearsay statements as testified to by Mr. Ching Ho. I believe Captain Pavao's statements on the telephone at this point are pure hearsay.

The Court: Yes.

Q. (By Mr. Collins): As a result of your telephone conversation with Captain Pavao, what did you do?

A. After the conversation?

Q. As a result of the conversation, what did you do?

A. I informed Cho that I was going to call Captain Pavao up again at 12 o'clock.

Q. Did you? A. I did.

Q. And what happened as a result of that telephone conversation?

A. At that time he told me the price of towing the sampan——

Q. No. Will you just tell us what happened as a result of the conversation. After you had your telephone conversation with Captain Pavao, you did certain things. We are interested in knowing what you did after that, rather than what Captain [201] Pavao told you on the telephone.



(Testimony of Ching Ho.)

A. I handed the telephone over to Cho.

Q. And he spoke on the telephone?

A. He spoke on the telephone.

Q. And what happened after that?

A. After that he gave me the telephone back and I talked to Pavao again.

Q. This was the same 12 o'clock conversation with Captain Pavao; is that correct?

A. That's right.

Q. As a result of this telephone conversation did you have any conversation with Mr. Cho?

A. I did.

Q. And what was the substance of that conversation?

A. At that time Captain Pavao told me——

Q. No. We will have Captain Pavao tell what he said. Will you tell us what you said to Mr. Cho, or what Mr. Cho said to you in the conversation.

The Court: After the telephone call.

Q. After the telephone call.

A. After the telephone call, I told Cho to get his—I gave him two six-hundred feet line to get his sampan ready to pull it off the reef.

Q. Was there any discussion of the telephone call with Mr. Cho? [202]

A. After the 12 o'clock 'phone?

Q. Yes. After that call was completed, did you have any discussion with Mr. Cho about the call?

A. I don't remember if I did.

Q. Well, then, what did you do after that?

(Testimony of Ching Ho.)

A. After that I gave him the lines to wrap around the boat to get ready to tow it off the reef.

Q. And then what happened?

A. Then I left Kaunakakai for Kolo.

Q. After going to Kaunakakai, what did you do then?

The Court: Kolo, you mean.

Mr. Collins: Kolo. I am sorry. Strike that question.

Q. (By Mr. Collins): After you arrived at Kolo, what occurred?

A. I waited off Kolo until the Tug Kolo brought the barge out from Kolo dock to where I can pick it up off Kolo there.

Q. What did you do with the barge?

A. I took it to Kaunakakai.

Q. Did you give the captain of the Kolo any orders? A. Yes, I did.

Q. And what was the substance of the orders you gave him?

A. I told him to proceed to Kaunakakai. [203]

Q. And you arrived at Kaunakakai thereafter?

A. I arrived at Kaunakakai at 4 o'clock.

Q. That was on what day? A. Tuesday.

Q. Was the Kolo there at that time?

A. He was there.

Q. And what happened on your arriving at Kaunakakai?

A. The Kolo was waiting there for me. After I docked the barge at Kaunakakai dock, he came

(Testimony of Ching Ho.)

alongside to pick me up to go out and to tow the sampan off the reef.

The Court: By that you mean you transferred onto his boat?

The Witness: I did.

Q. (By Mr. Collins): Will you explain the operation of towing the sampan off the reef?

A. We got off where the sampan was on the reef. The Kolo stayed in deep enough water where she can stay in position. We ran a line in from the Tug Kolo to the sampan on a small skiff.

Q. Did you go on board the sampan?

A. I was on board. I hooked it my myself.

Q. After the Kolo was rigged up, did you direct the operation of the Kolo? A. I did.

Q. And was the Kolo able to pull the sampan off? [204] A. No.

Q. After you observed that the Kolo could not pull the sampan off, what did you do?

A. I talked to Mr. Cho.

Q. What was the substance of that conversation?

A. To have the Mahoe tow the sampan off the reef, to assist the Kolo.

Q. And as a result of that conversation, what occurred?

A. He told me it was all right.

Q. And then what happened?

A. I went in and get the Mahoe.

Q. You towed with the Mahoe? A. Yes.

(Testimony of Ching Ho.)

Q. And as a result of your towing, what occurred?      A. The sampan came off.

Q. Will you describe the operation after that until we get it to the pier?

A. I went in and get the Mahoe and I came out and hook on the line to the Kolo's bow. We start pulling together, just pulling together slow, and the sampan came off the reef.

Q. Let us bring it into the pier. What occurred between that time and the time it was finally docked?

A. I let go my line and stood by until the Kolo took the sampan alongside the dock.

Q. When you were rigged up with the Kolo, were you [205] directing the operation?

A. I was.

Q. Did you give the captain of the Kolo any orders with respect to the docking of the sampan?

A. After he hooked up the sampan, he directed it himself.

Q. Did you bring the Mahoe into the—Did you dock the Mahoe, also?      A. I did.

Q. After all the vessels were docked, did you have any conversation with the owner of the sampan?      A. I did.

Q. What was the substance of that conversation?

A. I told him that the—that he might dive down and see whether he got his rudder or his propeller is still there.

Q. What occurred?

(Testimony of Ching Ho.)

A. He did, and he came up and he said the rudder and the propeller is banged up and not in condition to run.

Q. Did you have any discussion with him in connection with towage of this vessel to Honolulu?

A. I told him that the Kolo was going to lay in Kaunakakai overnight, that if he want Kolo to tow the sampan to Honolulu, he should call Captain Pavao and get his permission before the Kolo can pull it back. I gave Cho here Mr. Pavao's telephone number and he told me he was going back to his hotel and call him up. [206]

Q. Did you have any conversation with Joe Kahiapo in connection with towage to Honolulu?

A. I did. I told him that Cho was going to call Mr. Pavao up to get his permission for Joe to tow the sampan back.

Q. Did Kahiapo ever say to you that he intended to tow it back?           A. No.

Q. Did you ever give him orders to tow it back?

A. I did not.

Q. Would you tell the Court what the relative size of your tug and the Kolo is.

A. You mean the size between——

Q. Yes, the size of the two of them.

A. The Kolo is just a 65-footer. The Tug Mahoe is 125 foot. The Kolo is 250 horsepower. The Mahoe is 750 horsepower.

Q. And how do your crews compare in size?

A. I have thirteen men; the Kolo has two men.

(Testimony of Ching Ho.)

Q. When two tugs are working together, two Young Brothers tugs are working together, one of which is your tug, who normally gives the orders?

A. In that case I was giving the orders.

Q. On what basis were you giving the orders?

A. I was the senior captain at that time.

Q. So the junior tug captain takes the orders from the senior tug captain; is that correct? [207]

A. Yes.

Q. And what were the final instructions that you gave to Kahiapo before leaving?

A. Before leaving I told him not to—I told him to find out before he towed the sampan home the next morning.

Q. At any time that you were in the harbor at Kaunakakai did Mr. Cho say to you that he had received authority from Young Brothers to have the sampan towed to Honolulu? A. No, sir.

Q. Did he at any time say that he had made any agreement with Kahiapo to have it towed to Honolulu? A. Not while I was there.

Mr. Collins: That is all.

### Cross-Examination

By Mr. Quinn:

Q. You told Joe to find out, before he pulled the sampan away the next morning, whether he could; is that right?

A. Whether he could bring it back?

Q. Whether the Company would let him bring

(Testimony of Ching Ho.)

it back; so therefore he had told you that he intended to bring it back; is that right

A. He didn't tell me that.

Q. Why is it you say you told him to "find out before you bring it back tomorrow morning"?

A. I told him to find out from the port captain. [208]

Q. And what did he say when you told him that?

A. He said it was all right.

Q. He said what?

A. He said he will find out.

Q. He said he would find out. That is Joe talking? A. Joe.

Q. When you left, was there any other Young Brothers tug in the harbor of Kaunakakai?

A. Just the Kolo.

Q. So the Kolo was the senior Young Brothers tug captain there when you left; is that right?

A. He was the only tug there.

Q. That's right. How long had you been a tug captain?

A. I have been with Young Brothers for 19 years. I was tug captain since 1933.

Q. You are a very experienced tug captain; I take it you have been on several salvage operations then. A. I was.

Q. When a prospective customer of Young Brothers asks that something be done, do you usually tell the questioner to call the Company to see whether you can do it? A. In what way?

(Testimony of Ching Ho.)

Q. Isn't it a bit unusual if you would tell Mr. Cho to find out whether Joe has Company authority to tow this sampan to Honolulu? [209]

A. I wanted him to talk to Mr. Pavao.

Q. Why didn't you tell Joe to call Captain Pavao?

A. I told Joe to find out whether he can tow it or not.

Q. Did you tell Joe to call Captain Pavao?

A. No.

Q. But you told Mr. Cho to call Captain Pavao?

A. That's right.

Q. To see whether Joe could tow the sampan to Honolulu; is that right? A. No.

Q. What did you tell Mr. Cho?

A. I told Mr. Cho that the Kolo was laying there overnight, for him to make arrangements with Mr. Pavao for the Kolo to tow the sampan back, if it is all right with Mr. Pavao.

Q. So you told him. You told Mr. Cho to make arrangements with Mr. Pavao, and you told Joe to make arrangements with Mr. Pavao?

A. I told him to find out whether he did or not.

Q. To find out from whom? A. From Cho.

Q. Do you know what a tug owner's and a tug master's responsibility is if they leave a menace to navigation in a harbor?

A. You mean a tug owner, or a tug master?

Q. Yes. Did you get my question? [210]

A. I didn't quite get it.



(Testimony of Ching Ho.)

Mr. Quinn: Would you read the question back.

(Question read.)

The Court: Do you understand the question?

The Witness: I don't quite.

The Court: Did you hear it?

The Witness: Yes, I did.

The Court: But you don't understand it?

The Witness: No.

Q. (By Mr. Quinn): If you towed a ship into Kaunakakai Harbor and it sank in the harbor, what would you as a tug master have to do, if you know?

A. I know a ship that is going to sink, I wouldn't tow it in the harbor.

The Court: But he is asking you, suppose it did sink.

Mr. Quinn: Thank you, your Honor.

The Court: He is asking you to suppose it did sink.

The Witness: In the harbor, you mean?

The Court: Yes. Supposing a tow that you brought into a harbor did sink. That is what he is asking you to assume. He is not saying that this Tenyo Maru sank. This is a hypothetical, theoretical question. He is asking you to assume those facts. Now, assuming those facts, he is going to ask you a question. Go ahead.

Q. (By Mr. Quinn): I would just like to know, Captain, [211] what you would do if your tow sank in a harbor.

A. I would notify——

(Testimony of Ching Ho.)

Q. What you would be compelled to do.

A. I would notify the office that my tow sank.

Q. You don't know of any duties you have, irrespective of whether you are employed by Young Brothers or anybody else; is that right?

Mr. Collins: I think that question might be clarified. It is a pretty broad question: You don't know what your duties are.

Mr. Quinn: Very well.

Q. (By Mr. Quinn): As far as you know, you would have no duties with respect to a tow of yours which did sink in a harbor, whether or not you were working for Young Brothers, just as a tug master?

A. I would see that she won't sink in a harbor like that.

Q. You say that on Monday, April 5, you were instructed by Captain Pavao to go to Kaunakakai to assist the Tenyo Maru off the reef; is that right?

A. Yes.

Q. Were you told at that time that the Kolo would be there?

A. He told me that the Kolo went up to Kaunakakai.

Q. Did he tell you that the Kolo had been ordered to [212] help them off the reef if he could?

A. Yes, he did.

Q. So you didn't know, when you were going to Kaunakakai, whether or not the ship might already be off the reef?

(Testimony of Ching Ho.)

A. I got up to Kolo that morning and Kahiapo told me.

Q. Answer the question. I am asking you about Monday when you were talking to Captain Pavao and receiving your orders and you were told to go to Kaunakakai to assist the Tenyo Maru off the reef; you say that you knew the Kolo was up there; is that right? A. Yes.

Q. Now, then, you didn't know whether or not the Tenyo Maru might already be off the reef when you got there; is that right?

Mr. Collins: If your Honor please, I believe the witness was answering that question. There was one stop that was made before Kaunakakai and he was explaining what happened there that would influence his knowledge before he hit Kaunakakai.

Mr. Quinn: I am not asking his knowledge when he hits Kaunakakai, if the Court please. Mr. Collins is attempting to show that this was the boss man, this was the man who was necessary to pull it off the reef, and he was the one to give the orders, the one who gave the orders; whereas, in fact, it might be that the Kolo, the flat bottom tug, could have towed [213] it off and could have had authority to tow it off, and it could have been at the pier, and he would have known nothing about it; and that is the end of the matter.

The Court: I am not clear whether or not this captain knew, prior to his leaving Honolulu on Monday, of the fact that the captain of the Kolo had

(Testimony of Ching Ho.)

been given instructions with respect to the Tenyo Maru.

Mr. Quinn: I believe I just asked him that question before this question, your Honor, and he answered 'yes' as I recall. Is that your recollection?

Mr. Collins: That is my recollection.

The Court: Did you know, before leaving Honolulu on Monday, that Joe Kahiapo, captain of the Tug Kolo, who had preceded you to Molokai, had been given some instructions with respect to assisting the Tenyo Maru off the reef?

The Witness: That was told by Captain Pavao.

The Court: You knew that?

The Witness: Yes.

The Court: Now, Mr. Quinn's question to you: Therefore, the Tug Kolo having already arrived on Molokai before you left Honolulu, you didn't know whether or not you might not arrive over there and find that the Tug Kolo had the job already done.

Mr. Quinn: That is right.

The Court: Isn't that right? It was possible?

The Witness: It was possible.

The Court: There might have been no job for you to do when you got there—of that nature?

The Witness: That is right.

Q. (By Mr. Quinn): Did you have any discussion with Captain Pavao with respect to towing the Tenyo Maru to Honolulu? A. No.

Q. He didn't tell you to tow it to Honolulu, did he? A. No.

(Testimony of Ching Ho.)

Q. He didn't tell you not to tow it to Honolulu, did he?      A. I didn't talk to him about towing.

Q. You didn't talk to him at all about that?

A. No.

Q. He didn't tell you at that time to issue any orders to the captain of the Kolo, one way or the other, about towing to Honolulu, did he?

A. No, sir.

Q. When did you first get to Kaunakakai?

A. Nine o'clock Tuesday morning.

Q. That was after you had already gone to Kolo, or before?

A. I stopped at Kolo before I go to Kaunakakai.

Q. You stopped at Kolo, then you went to Kaunakakai; then did you go back to Kolo and get your barge?      A. I did.

Q. And then came back to Kaunakakai again?

A. Yes.

Q. When you got to Kaunakakai Tuesday morning, was the Kolo there?      A. No, sir.

Q. The Kolo was at Kolo?      A. Kolo.

Q. And did you then see whether the Mahoe could pull the Tenyo Maru off the reef?

A. I looked at the Tenyo Maru. I knew I can't pull it off the reef.

Q. You had too deep a draft?

A. Too deep a draft and the equipment was not ready for me to tow it off.

Q. You would have to do it almost immediately in order to make your——

A. Kolo run.

(Testimony of Ching Ho.)

Q. (Continuing)—Kolo run. Now, at that time, Tuesday morning, when you were there, before you went back to Kolo, do you say you called Captain Pavao?  
A. I did.

Q. And your conversation then dealt with the question of taking the sampan off the reef; is that right?  
A. Yes.

Q. Did you have any conversation with him at that time about towing to Honolulu? [216]

A. No.

Q. You didn't know whether it would be necessary or desirable at that time, did you?

A. That's right.

The Court: Speak louder. You said, "That is right"?

The Witness: That is right.

Q. (By Mr. Quinn): Now, then, you returned and called Captain Pavao again about noon?

A. I was still there then.

Q. That was before you made your pineapple run?  
A. That's right.

Q. What had you done from 9 to 12? Looked over the Tenyo Maru?

A. The Tenyo Maru and talking to Cho.

Q. And talking to Cho. And you were instructing him how to rig the Tenyo Maru for the tow job; is that correct?  
A. That is right.

Q. Why did you happen to call Captain Pavao two times that morning?

A. He told me, after I talked with him at 10

(Testimony of Ching Ho.)

o'clock, he told me to call back at 12; he will talk to Mr. Harrison.

Q. How much it would cost to tow it off the reef?

A. Off the reef.

Q. And you did call at 12. Did Captain Pavao tell you how much it would cost to tow it off the reef? [217]

A. He told me and I handed the 'phone to Cho.

Q. The Tenyo Maru was still one the reef; is that right? A. That is right.

Q. No discussion about any towing to Honolulu at all? A. No, sir.

Q. What time did you finish your towing operations at Kolo?

A. You mean when I get back to Kaunakakai?

Q. Yes, when did you get back to Kaunakakai?

A. At 4 o'clock.

Q. Four o'clock. What time did you leave Kaunakakai that evening? A. Six thirty.

Q. Six thirty. How long did it take you to get on the Kolo and direct its operations and find that it couldn't tow the Tenyo Maru off, so changed to the Mahoe? How long did that entire operation of towing the Tenyo Maru off and back to the pier take?

A. We left the pier at 4:15 to go to the Tenyo Maru. We was all tied up at Kaunakakai dock again at 6 o'clock.

Q. Fast job. Now, when you were tied up at the pier, how did the subject of towing to Honolulu first come up?

(Testimony of Ching Ho.)

A. Well, I told him to find out whether he had his propeller and rudder on yet.

Q. Yes. [218]

A. He dived down and said he didn't have his rudder on, so I told him the Kolo was laying there overnight. I gave him Mr. Pavao's telephone number so he can get permission to have the Kolo tow it to Honolulu.

Q. And you indicated that the Kolo was fit for the job and the Tenyo Maru was fit to be towed, if Captain Pavao said so; is that right?

A. Yes, sir.

Q. Did you examine the bottom of the Tenyo Maru?

A. You can't see the bottom. She was under water. I looked in the engine room.

Q. Did she have a leak?

A. She had a lot of water in there, must be leaking.

Q. You told Cho then that the Kolo would be there overnight and would be available to tow him back if Captain Pavao said it was all right?

A. Yes, sir.

Q. Was Joe there at the time that you talked to John Cho?      A. No, I don't think so.

Q. Where was he?

A. He was on my tug, Mahoe.

Q. And this was after you were tied up at the pier, was it?      A. Yes. [219]



(Testimony of Ching Ho.)

Q. After the Tenyo Maru was tied up at the pier? A. Yes.

Q. And you were making ready to set sail for Honolulu? A. Yes.

Q. The Mahoe was; is that right?

A. I was on the Tenyo Maru then.

Q. But I mean within that half hour you were going to take off and head for Honolulu; is that right? A. Yes, sir.

Q. And you were speaking to Mr. Cho on the Tenyo Maru? A. Yes.

Q. And Joe was on the Mahoe? A. Yes.

Q. Then after you spoke to Mr. Cho, you went over to the Mahoe, did you? A. Yes.

Q. And Joe was over there? A. Yes.

Q. And that is when you told Joe that you had told John to call Captain Pavao; is that right?

A. Yes, sir.

Q. And as far as your present recollection is concerned, Joe didn't say that he thought that was part of the salvage job and he had been told to do it?

A. Towing it home? [220]

Q. Yes.

A. He didn't say anything about it.

Q. Are you sure he said nothing about that?

A. No.

Q. You are not sure?

A. I am sure he didn't say anything about towing.

Q. You are sure he didn't say anything about towing it back to Honolulu? A. Yes, sir.

(Testimony of Ching Ho.)

Q. He didn't say anything about having authority to tow it back by virtue of having been directed to salvage it?

A. He didn't say anything to me about it at that time.

Q. Did you ever hear any figures about fifty dollars an hour for the Mahoe and thirty-five dollars an hour for the Kolo in connection with this operation?

A. I don't remember anything like that.

Q. You were never told those figures?

A. I don't remember whether I did or not.

Q. Could you have been told those figures by Captain Pavao, for instance?

A. No, sir.

Q. What price did Captain Pavao say for pulling the Tenyo Maru off the reef?

A. About \$200.

Q. About \$200. So you don't recall now hearing any [221] statement about \$50 an hour for one tug and \$35 an hour for another? A. No, sir.

Q. Do you recall Joe's telling you, after you gave him a message about Captain Pavao—Do you recall his telling you that he intended to take the boat back the following morning? A. No, sir.

Q. Would you deny that he told you that he intended to take the Tenyo Maru back the next morning? A. What was that again?

Q. Would you deny that Joe Kahiapo told you Tuesday afternoon that he intended to take the

(Testimony of Ching Ho.)

Tenyo Maru under tow back to Honolulu the following morning?      A. He didn't tell me that.

Q. You deny that he told you that?

A. He didn't tell me he was going to take it to Honolulu.

The Court: Did he tell you he was going to take it anywhere?

The Witness: He didn't mention anything that he was going to take it.

The Court: At this point, Mr. Quinn——

Mr. Quinn: I have no further questions.

The Court: I would like to make sure I heard something correctly. Did I understand you to say, Captain, that after the Tenyo Maru was tied up at the pier of Kaunakakai [222] and you had been aboard it and looked at the damage as best you could, and had a report from Mr. John Cho that his rudder and his propeller were damaged, that after you were conscious of the fact that the Tug Kolo was going to remain there overnight, and so forth, that it was your opinion and is your opinion today that the Tug Kolo was capable of towing the Tenyo Maru to Honolulu and that the Tenyo Maru in its then condition was then capable of being towed successfully to Honolulu by that Tug Kolo? Did I understand you to say that?

The Witness: If he had permission from Captain Pavao.

The Court: If he had permission?

The Witness: Yes.

(Testimony of Ching Ho.)

The Court: I understood you correctly?

The Witness: Yes.

The Court: Based on that——

Mr. Quinn: I may have additional questions, your Honor.

The Court: All right. I think I will take a final morning recess.

(Recess had.)

Q. (By Mr. Quinn): Captain, when you were at Kaunakakai Tuesday morning looking over the situation to see whether the Mahoe might be able to tow the Tenyo Maru off the reef—Do you know the time I am talking about?—before you went to [223] Kolo to do your pineapple barge operation, you went aboard the Tenyo Maru?

A. No, I did not.

Q. When you instructed Mr. Cho to rig the vessel for towing, you didn't go aboard the Tenyo Maru?

A. No.

Q. Where did you talk to Mr. Cho?

A. On the dock.

Q. On the dock. When you came back and before you towed the Tenyo Maru off the reef, did you ever go aboard her?

A. I went aboard her after we hooked up to the Tenyo Maru.

Q. You did go aboard the Tenyo Maru?

A. Yes, I did.

Q. Can you describe for the Court the type of

(Testimony of Ching Ho.)

hole she had developed in her side as a result of the banking on the reef?

A. You mean on the Tenyo Maru?

Q. Yes.

A. I didn't see any hole, just the way she was resting on the rocks there.

Q. You didn't see that?

A. I saw where she was resting on the rocks.

Q. And did you see what had happened to the planking as a result of resting on the rocks? [224]

A. Just smashed in.

Q. And can you describe how much it was smashed in?

A. Just the planking where she was resting on the rocks.

Q. You say it was smashed in?

A. Just where the big boulder was there and where she was resting on the reef there.

Q. In such a situation, in your opinion, when it was taken off the reef, did you think it would leak?

A. After she got off the reef?

Q. Yes.           A. Yes, she did.

Q. Well, did it leak much?           A. Yes, it did.

The Court: If I understand it correctly, it was leaking when it was on the reef.

Mr. Quinn: As I recall the testimony, your Honor, it is that it would leak up to a certain point because it was not necessary at that time, because of the height of the vessel on the reef, to use the pump.

(Testimony of Ching Ho.)

The Court: But it was leaking?

Mr. Quinn: Well, it was leaking, or had already leaked up to its volume.

I have no further questions.

### Redirect Examination

By Mr. Collins: [225]

Q. Captain, on Tuesday afternoon, after the Tenyo Maru was brought into the pier, was there any discussion with Mr. Cho about patching the hole?

A. We had. He told me the next morning he would have a crane to tip the sampan over and patch that up.

Q. Did you tell Mr. Cho that the Tenyo Maru was fit to be towed to Honolulu in the then condition? A. I did not tell him that.

Q. When the Judge asked you whether, in your opinion, at that time, the Tenyo Maru was fit to be towed to Honolulu, were you thinking in terms of the patch or without a patch?

A. You mean to tow it to Honolulu?

Q. Yes. A. With the patch on.

Q. As it stood at that time, without the patch, was it your opinion that it could be towed in?

A. No.

Q. Do you normally, on this pineapple run, go into Kaunakakai? A. Go into Kaunakakai?

Q. Do you, on this pineapple run, taking the

(Testimony of Ching Ho.)

barge down to Kolo, do you normally go into Kaunakakai anyway?

A. To wait for the Kolo barge.

Q. You misunderstand me. In your normal operation, when you take a barge down to Kolo, after you have left the [226] barge at Kolo, do you normally go to Kaunakakai?

A. No. Sometimes we anchor at Kolo.

Q. But if you don't anchor at Kolo?

A. If we don't anchor at Kolo, we go to Kaunakakai.

Q. And whether you anchor or not depends on the sea conditions, I assume.

A. Yes, sir.

Mr. Collins: That is all.

The Court: Any further questions?

Mr. Quinn: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Mr. Pavao.

## WILLIAM PAVAO

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Will you state your name, age, residence, occupation and citizenship.

The Witness: William Pavao.

The Court: Age?

(Testimony of William Pavao.)

The Witness: Age 44.

The Court: Residence?

The Witness: Residence, 2113 Metcalf Street.

The Court: Honolulu? [227]

The Witness: Honolulu.

The Court: Occupation?

The Witness: Captain, Young Brothers tug.

The Court: And you are a citizen of the United States?

The Witness: Yes.

The Court: Exclusively?

The Witness: Yes.

The Court: Take the witness.

#### Direct Examination

By Mr. Collins:

Q. What was your occupation on or about April 4, 1948? A. Port captain for Young Brothers.

Q. What are your duties as port captain?

A. Dispatching tugs for the jobs.

Q. Is it your job to give instructions to each tug on each job? A. Yes.

Q. On April 5 did you give any instructions to the captain of the Tug Kolo?

A. Tug Kolo, the only instructions I gave him, the pineapple tug to Kolo.

Q. In what form were those instructions?

A. There was written orders before that, though. That was on Friday.

Q. Those were the only instructions that you gave? [228] A. Yes.



(Testimony of William Pavao.)

Q. Did you order the captain to do anything before he shoved off?      A. No.

Q. When the Tug Mahoe left on or about that day, did you give any instructions to the captain of that boat?      A. About the pineapple barge.

Q. Did you give him any instructions with respect to the Tenyo Maru?      A. No, I did not.

Q. Did you give any instructions to Kahiapo on the Kolo with respect to the Tenyo Maru?

A. No, I did not.

Q. Did you have any conversation or communication with anybody on Sunday, April 4, in connection with the Tenyo Maru?

A. No, I did not.

Q. On Tuesday, April 6, did you have any conversation with anybody in connection with the Tenyo Maru?      A. Yes, I did.

Q. And what was the nature of that conversation?

A. That was around ten o'clock on Tuesday morning. Captain Ching Ho called in from Kaunakakai about the sampan on the reef, and he wanted to get orders what he is supposed to do. In the meantime I told him that Mr. Harrison was having a directors' meeting and he will have to call back around noon. [229]

Q. And did he call back?

A. About noon the directors' meeting was all over, and I talked to Mr. Harrison about the sampan, wanted to quote a price pulling off the reef,

(Testimony of William Pavao.)

and they didn't have any lines; and he said around \$200 to pull the sampan off the reef, and about the money we will have to wait until he gets to Honolulu to settle the money.

Q. In this ten o'clock telephone call that you had from Captain Ching Ho, was there any discussion as to towage to Honolulu?

A. No, none at all.

Q. In the discussion that you had with Mr. Harrison after that ten o'clock telephone call, was there any mention made of towage to Honolulu?

A. No, none.

Q. You say that you received a second telephone call from the captain of the Mahoe on that day?

A. Yes, I did.

Q. What was the substance of that?

A. That is twelve o'clock, and I told him about what Mr. Harrison told me, the price and just to tow the sampan off and keep on with his pineapple, to have the Kolo, and give lines, and assist the sampan off the reef. And Mr. Cho there grabbed the 'phone, and he said he was a poor man; he didn't have any money. And I told him, it is all right; we will get [230] the sampan off the reef, and then we have Ching Ho back on the 'phone and I gave him the orders.

Q. Was there any discussion in this telephone conversation with Mr. Cho concerning towage to Honolulu?

A. No.

Q. It was never mentioned at all?

(Testimony of William Pavao.)

A. Nothing at all.

Q. Had you had any previous conversation with Mr. Cho?      A. No, I did not.

Q. How long have you been port captain?

A. I have been port captain for nineteen years.

Q. With Young Brothers all that time?

A. Twenty-six years.

Q. Twenty-six years with Young Brothers. Could you tell us something about the operating procedure on towage jobs, how the jobs are assigned and what the arrangement is that is entered into for the various towing jobs?

Mr. Quinn: I object to the introduction of evidence with respect to Young Brothers towage jobs as not being material to the issues in this case, if the Court please.

The Court: What would be the purpose when it is obvious that you contend no such rules or regulations or formalities were complied with?

Mr. Collins: Our purpose was merely to establish the limitations on the authorities of the captains of the various [231] tugs with respect to towage jobs.

Mr. Quinn: If the Court please, unless you want to give some foundation that John Cho was familiar with the rules and regulations, that also would be completely immaterial even for that purpose; but, irrespective of the question of the actual authority of these various captains, we have had at great length the evidence of what transpired with respect

(Testimony of William Pavao.)

to this transaction, and I see no materiality whatsoever in introducing now what they do in a number of other towing transactions.

Mr. Collins: I believe that the general practice and policy of the Company, the well established rules, are a matter of distinct relevancy, your Honor.

The Court: I can't particularly see it, but go ahead and see where it may become relevant.

Q. (By Mr. Collins): Do you recall the question?

A. Yes. All jobs comes into the office. We dispatch them to the tugs, what ships are—what pineapple barges are to be towed; and all orders come from the office.

Mr. Collins: No further questions.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. Captain Pavao, is there any special meaning which you people at Young Brothers attach to the word "salvage"? What does "salvage" mean to you? [232]

A. Salvage?

Q. Yes.

A. You mean to pull something off the reef. That is all I know.

Q. Take it to a safe place?

A. Safe dock and tie him up; that is all.

(Testimony of William Pavao.)

Q. Would that include a place where it could be fixed?  
A. Well, the first dock.

Q. The first dock—— A. Ties them up.

Q. Suitable for making repairs necessary?

The Court: Both of you were talking at once.

Mr. Quinn: I think he kept nodding his head.

The Court: Go over that again. I didn't get it.

Q. (By Mr. Quinn): The first dock, Captain Pavao, suitable for making repairs to put her in condition?

A. Have to be before you can do anything else, in the first dock in smooth water.

The Court: Captain, either you are not giving us full answers or you are not talking as loud and distinctly as you might. What Mr. Quinn wants to know is whether or not, in your opinion, as a man with 19 years' experience in this tug boat business, a salvage operation is completed when a boat is taken off the reef and brought to any safe harbor; or is it completed only when it is brought off the reef to the [233] type of harbor where it can be repaired efficiently?

The Witness: My experience, when you pull the ship off the reef and you tie it up to any dock where it can be repaired, safe dock.

Q. (By Mr. Quinn): You never discussed this Tenyo Maru situation with the captain of the Kolo at all?  
A. None at all.

Q. When did the Kolo leave for Kolo?

(Testimony of William Pavao.)

A. The Kolo left on Monday morning, eight o'clock.

Q. Were you aware of any instructions that had been given it with respect to the Tenyo Maru?

A. No.

Q. If instructions had been given it, would you normally have been aware of them?

A. I had orders from Mr. Harrison to Joe to go upstairs, Joe Kahiapo, the operator of the Kolo.

Q. To go upstairs?

A. To see Mr. Harrison.

Q. But you don't know what transpired between Joe and Mr. Harrison?      A. No, I don't know.

Q. And as far as you knew, then, the Kolo was going no place but to Kolo?      A. To Kolo.

Q. You are the man who is charged with keeping track of [234] the operation of these tugs?

A. Yes, sir.

Q. Mr. Harrison didn't tell you he had diverted the Kolo?

A. Afterwards he told me the Kolo was going to Kaunakakai.

Q. When did he tell you that?

A. After he got through talking to Joe.

Q. Before the Kolo left, you knew it was going to Kaunakakai; is that right?      A. Yes.

Q. So then your answer to Mr. Collins, that the only instructions for the Kolo were to go to Kolo is not entirely accurate, because you knew there were other instructions; is that right?

(Testimony of William Pavao.)

A. Yes, but my orders was for pineapple; that is what he was asking.

Q. So when you so answered Mr. Collins' question or comment, as far as you were concerned any orders you had given were to go to Kolo?

A. Yes.

Q. But you knew Mr. Harrison had given orders to stop at Kaunakakai? A. Yes.

Q. Now, with respect to the Mahoe, what were your instructions to the Mahoe?

A. Pineapple barge, to Kolo, Kaunakakai. [235]

Q. And as far as you knew, the Mahoe had no instructions with respect to the Tenyo Maru?

A. None at all.

Q. Now, I know you didn't give him any instructions, but are you sure that you didn't know of any instructions that might divert the Mahoe?

A. No.

Q. So, as far as you were concerned, the Mahoe was off course when it was in Kaunakakai?

A. Pineapple barge; it wasn't off course at all.

Q. When it was in Kaunakakai harbor before it picked up its pineapple barge at Kolo?

A. The Mahoe went out with two barges; dropped one at Kolo and one at Kaunakakai, and waited at Kaunakakai until it got orders for Kolo at 1 p.m.

Q. But you didn't know that the Mahoe had been given instructions to assist the Kolo in taking the Tenyo Maru off the reef?

(Testimony of William Pavao.)

A. No, none at all. He didn't have no orders until he telephoned down to me, when he called me up at noon.

Q. Are you sure that the Mahoe had no orders until he called you at noon? A. Yes.

Q. You are positive that Mr. Harrison gave no orders to the Mahoe? [236]

A. No, I didn't hear anything about it.

Q. You didn't hear anything about it, but if I were to tell you that Mr. Harrison testified he had given some orders to the Mahoe, would you then deny that he had?

A. No, I didn't know anything about it.

Q. If I were to tell you that Ching Ho had testified that he had received orders from you that he was to assist the Kolo with the Tenyo Maru, would you continue to deny that you had issued those orders? A. Not when he left here.

Q. I am telling you that if I were to tell you he testified that you so instructed him on Monday, April 5, would you still deny it? A. Yes.

Q. That does not refresh your recollection?

A. No.

Q. Now, is it a regular practice at Young Brothers for orders to be issued to tugs without your knowledge, and in addition to such orders as you give to the tugs?

A. Well, at times there the boss gives orders to the tugs, and sometimes I do.



(Testimony of William Pavao.)

Q. And sometimes the boss fails to advise you that he has given orders to tugs?

A. Sometime he by-pass and he forget about it, and sometimes he don't. [237]

Q. And this was a double by-pass; is that right?

A. Well, Mr. Harrison is a new boss at Young Brothers. Mr. Young died, and there is different routines of working down there, too. Mr. Young works one way and Mr. Harrison works some other way.

The Court: Mr. Quinn, you made a statement that I don't think is right. You said that Mr. Harrison testified that he gave instructions to Captain Ho. I think you are confused.

Mr. Quinn: I stated that hypothetically, but I then checked back, and I believe there was a mistake. I then framed the same question with respect to Ching Ho. I would be glad to have that stricken, and apologize.

I also apologize to you.

I have no further questions.

The Court: Very well. It is 12 noon. We will resume at 1:30, unless you have just a few questions.

Mr. Collins: I might say I have no further questions of this witness, your Honor. That completes the Libellee's case.

The Court: All right, but I have a question I want to get cleared up on, the same one I asked, based on a question that was asked before.

Getting back to the salvage business, you remem-

(Testimony of William Pavao.)

ber the question Mr. Quinn asked you, and I asked it over again? [238]

The Witness: Yes.

The Court: You are familiar with the harbor at Kaunakakai?

The Witness: Yes.

The Court: And facilities there available?

The Witness: Yes.

The Court: Based on your experience and this situation that is on trial here, in your opinion was the salvage operation completed when that Tenyo Maru was pulled off the reef and taken to the pier at Kaunakakai harbor?

The Witness: Yes. Kaunakakai harbor is very smooth water in there and you have cranes, big CPC cranes, larger cranes working at the docks, and you have shallow waters; you can run the boat up on the beach for repairs, and it is a very nice harbor at Kaunakakai. You cannot pick any better harbor on Molokai coast.

The Court: Based on that, have either of you any further questions?

Mr. Quinn: I have.

### Cross-Examination

(Continued)

By Mr. Quinn:

Q. If I were to tell you the CPC crane was not large enough and repairs could not be effected at Kaunakakai, would you still say that the salvage operation was completed when the tow was deposited there? [239]

(Testimony of William Pavao.)

A. In Kaunakakai harbor the CPC crane would pick up ten ton.

The Court: What did the Tenyo Maru weigh?

Mr. Cho: Had a net of nine ton, but she weighed more.

Mr. Quinn: The only evidence, if the Court please, is that the CPC crane there was used in an attempt to make repairs, and it was then determined, if the Court please, that the CPC cranes were not heavy enough.

The Court: All I know is a CPC crane tried and failed to lift the boat.

Mr. Quinn: And that the conclusion was then reached that repairs could not be made at Kaunakakai.

The Court: What I am trying to insinuate is that it wasn't clearly foreclosed that they tried, and used the biggest crane that was available.

Mr. Quinn: That is true, except by inference, your Honor, which I think is a fair and reasonable inference, that they tried the crane and then concluded that there was nothing there that would aid them to repair the sampan.

The Court: Do you know the weight of the Tenyo Maru?

The Witness: The Tenyo Maru weighed nine ton.

The Court: Now, that is unloaded?

The Witness: Well, the engine on—It all depends—There [240] is no fish on; just a little fish.

(Testimony of William Pavao.)

The Court: And without water?

The Witness: Without water. Because in this Kaunakakai we had one example on the Mahoe, which she break the shaft on the way up and the crane picked the Mahoe stern right off, took the wheel off and everything, and I don't see why those two cranes up there couldn't work the sampan at Kaunakakai.

The Court: How much does the Mahoe weigh?

The Witness: The Mahoe weighs about 225 ton. It just hold the stern up where she was being repaired and took off the wheel, and she came home without the wheel. We done temporary repairs up there like that.

The Court: Are you familiar with the cranes that the CPC has?

The Witness: Yes.

The Court: Does it have more than one crane?

The Witness: Yes, they used to have three down there. They have two down there now.

The Court: Do cranes work in tandem as tugs do?

The Witness: Tandem?

The Court: You can use three cranes at once on one job?

The Witness: Yes, you can use two cranes on a heavy lift. [241]

The Court: I have perhaps opened up something which may cause both of you to want him to come back. Do you? Either of you?

(Testimony of William Pavao.)

Mr. Collins: I have no further questions.

Mr. Quinn: Nor I, your Honor. I think that is relatively immaterial.

The Court: All right. You are excused. And that is your case?

(Witness excused.)

Mr. Collins: Yes.

The Court: Do you have rebuttal?

Mr. Quinn: Yes, your Honor.

The Court: All right. 1:30?

Mr. Quinn: Yes, that is satisfactory.

The Court: All right. 1:30.

(Thereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. of the same day.)

Afternoon Session—1:30

Mr. Quinn: Will you take the stand, Mr. Cho.

JOHN Y. K. CHO

recalled as a witness on behalf of the Libellant, having been previously duly sworn, was examined and testified further as follows: [242]

The Court: You are the Plaintiff, John Cho, and you have heretofore been sworn; I remind you that you are still under oath.

The Witness: Yes, sir.

(Testimony of John Y. K. Cho.)

Redirect Examination

By Mr. Quinn:

Q. Mr. Cho, do you remember having a conversation with the captain of the Mahoe after the Tenyo Maru had been towed off the reef and taken to the pier at Kaunakakai? A. Yes, sir.

Q. And what did the captain of the Mahoe tell you?

A. Captain of the Mahoe told me to call the home office about the towing.

Q. Why didn't you call the home office?

A. Because, well, that night when I dived under to fix the rudder and the prop, I couldn't tell because the water being so dirty, so the next morning I wanted the crane to lift it up and see the extent of the damage before I do anything about towing.

Q. Yes. Why didn't you call the home office the next morning?

A. Then, the next morning Joe told me that he is taking—he has authority to take the boat in tow.

Q. So when Joe told you that, you then thought that there was no further necessity of calling? [243]

A. He told me in these words: "You don't have to call the home office because I have authority to take the boat in tow."

Q. On the matter of the cranes at Kaunakakai, how many cranes were at the pier or in the vicinity?

A. There were two cranes.

Q. Belonging to whom?

A. The CPC Company.

(Testimony of John Y. K. Cho.)

Q. How many cranes did you use in your attempt to effect some repairs there?

A. One crane, because the other one was not in working condition.

Q. What?

A. Was not in working condition. It was broken.

Q. Was not in working condition?

A. Yes, was not in working condition.

Q. Were you able to effect any repairs using the one crane?

A. No, we couldn't because it would be dangerous for the men to go under because you couldn't get at it and the crane couldn't lift the boat high enough to fix it.

Q. What was the capacity of the crane you were using?

A. The guy told me the capacity was seven ton.

Q. And the other crane that was not in working condition—— [244]

A. Was not in working condition.

Q. Was it a bigger crane?

A. It was the same type of crane.

Mr. Quinn: No further questions.

### Recross-Examination

By Mr. Collins:

Q. On Wednesday morning you say that Joe told you that he had authority to take the tow. Did he at any time previous to that say that he had that authority?

(Testimony of John Y. K. Cho.)

A. Will you give me that question again, please?

Q. Did Joe at any time previous to Wednesday tell you that he had authority to take your sampan in tow?

A. That point did not come up whether he did or whether he didn't.

Q. He never said that to you before?

A. No.

Q. Does Libby have a crane at Kaunakakai?

A. What do you mean "have a crane at Kaunakakai? Do you mean on the pier?

Q. Yes.

A. They have two cranes on the pier.

Q. Together with the two CPC cranes?

A. I guess that's what it was, two CPC cranes. There were two cranes on that pier there.

Q. Do you know to whom the cranes belonged?

A. CPC.

Q. Well, do you know whether Libby has a crane there? A. I do not know.

Mr. Collins: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Quinn: Call Mrs. North, please.

## PRICILLA NORTH

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:



(Testimony of Pricilla North.)

The Court: Will you please state your name.

The Witness: Pricilla North.

The Court: Miss or Mrs.?

The Witness: Mrs.

The Court: Can you tell me that you are over 21?

The Witness: Yes.

The Court: And you live here in Honolulu?

The Witness: Yes.

The Court: Are you employed?

The Witness: No, I am a housewife.

The Court: Are you a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Take the witness. Speak loud enough [246] so they can hear you.

### Direct Examination

By Mr. Quinn:

Q. Mrs. North, what is your relationship to John Cho?      A. I am his sister.

Q. Were you aware of the difficulties in which the Tenyo Maru was when it was on the reef at Molokai?      A. Yes, I did.

Q. When were you first advised that the Tenyo Maru had been taken off the reef?

A. I believe it was the day before my brother called me from Molokai saying that the boat was sunk. I got this call because ever since my brother

(Testimony of Pricilla North.)

left for Molokai I had been calling Young Brothers to get information. And this person I spoke to—I believe it was Mr. O'Neill—gave me this information from time to time, that he hadn't heard, that he was concerned, and that the Kolo was overdue, I believe, and then finally it was late that evening, that same evening, he called me saying he knew I was very much concerned about the boat and not to worry is was off the reef and was being towed back. And I got that call——

Q. Being towed back where?

A. To Honolulu.

Q. About what time in the evening was that?

A. I don't recall exactly what time, but it was—well, [247] I would say about 7:30, I believe. It was dark but it wasn't late at night. It was in the evening and not very close to midnight. It was about 7:30 or 8 o'clock.

Mr. Quinn: Your witness, Mr. Collins.

### Cross-Examination

By Mr. Collins:

Q. What day was this, Mrs. North?

A. It was the day before I got the news that the Tenyo Maru had sunk.

Q. Well, could you place that in the week at all?

A. Pardon?

Q. What day of the week was that?

A. Well, I believe it was on a Wednesday, be-

(Testimony of Pricilla North.)

cause, if I recall, the boat—well, it was Wednesday, I believe.

Q. You received this call on Wednesday?

A. Yes.

Q. Is there any particular way that you can fix it in your mind as being Wednesday?

A. Well, the way—well, Tuesday was the day that I was told, you know—John was in Molokai; he had been calling me telling me the boat was in this terrible difficulty. And Sunday was the day that we had gone down to ask the Young Brothers for help. My brother and I went to the office and we spoke to—I think his name was Mr. O'Neill—and he told me he would have to call someone else, evidently the president [248] of the Company; and at that same time I met the captain of the Kolo on Sunday. And John left, I believe, Monday morning, if I recall, because this fellow in the office told John to be sure to be there around 2 o'clock, that the Kolo would be due to arrive at Molokai at that hour. It must have been Wednesday because Tuesday they had been working all day on the boat.

Q. It could not have been Thursday?

A. Well, I can't say because I——

Q. You are not definitely sure?

A. The only thing I am sure of is that I got the call the day before.

Q. What was——

The Court: Wait a minute. The day before what?

(Testimony of Pricilla North.)

The Witness: Well, I got the call the day before—let's see now; I am all confused now; let's see. It was Sunday, and then Monday I knew nothing had happened, and Tuesday. It was the day before I heard that the boat had sunk.

The Court: What day did you hear that the boat had sunk?

The Witness: Well, it was—I was very relieved that day; in fact, I was very happy. Then all of a sudden John called me up the next day and told me there wasn't anything he could do, that the boat had sunk. So it was the day before I heard the boat had sunk.

Q. (By Mr. Collins): But you are unable to fix the date [249] beyond that?

A. No, because I——

Mr. Collins: That is all.

Mr. Quinn: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Quinn: That is all, your Honor. That is the extent of the rebuttal for the Libellant.

The Court: Where is Mr. North?

Mr. Quinn: I don't know, your Honor. I hadn't thought of calling Mr. North. I have never talked to him about the case.

The Court: Are you going to call him?

Mr. Collins: We hadn't planned to. If it would

help your Honor in making his decision, we would be happy to do it.

The Court: I am not sure it will, but there was such a "to-do" this morning about Mr. North, and, seeing Mrs. North here, I thought perhaps Mr. North was next.

Mr. Quinn: There is nothing in evidence. There was an offer of proof, and I think the Court should strike that from his mind. If Mr. Collins wants to show some sort of an agreement between Joe and Mr. Cho, I would be happy to arrange for Mr. North to be down here, but apart from that I [250] have rested and do not intend to call him.

Mr. Collins: I don't think it is necessary to ask the Court to strike it from his mind. In the position in which it is in, it is merely an offer of proof.

The Court: Have you any rebuttal evidence?

Mr. Collins: No rebuttal evidence.

The Court: I suppose the awash sampan could have wandered off somewhere. Before you close, let me tell you I am a little bit concerned about the fact that normally a sampan wouldn't sink even if it was cut loose from the tug, and I am curious to find out why it was—assuming everything else may have been unauthorized—why somebody didn't go back and find the thing and bring it home.

Mr. Quinn: Look for the tug, your Honor?

The Court: Look for the sampan.

Mr. Quinn: The sampan, I mean. I have no idea why, except that I can add this, that everybody was told at the time in a Coast Guard hear-

ing, that is, at that moment it was represented that they had watched a sampan sink, and it was only subsequently that it was learned—and I don't know whether John Cho knew that at the outset, but it was only by talking to other people involved, to Kalani and to Abell, and then to Kahiapo again that it was brought out. In fact, it was assumed that it would probably sink by the skipper of the sampan at the time it was cut. [251]

The Court: Let me be a little bit more specific. It may not be anything either of you want to cover. It occurs to me that the evidence here does not affirmatively show that the sampan when last seen by people who testified in this case had sunk. The evidence, to my mind, presently shows that when last seen a good deal of the sampan was awash. But, as you are fond of saying, there were several feet of freeboard, which I take it is wood above the water. The evidence further tends to show that there is reason for believing that sampans awash do not sink, easily at least.

Mr. Quinn: If I may add, your Honor, the evidence also tends to show that a sampan awash could be towed back.

The Court: Yes, I think you are right on that. What I am getting at is this: When the captain of the Tug Kolo arrived here in Honolulu, the evidence shows that he that night called Young Brothers, by calling its manager, Mr. Harrison, and reported what had happened to him.

Assuming that there was up to that time no lia-

bility on Young Brothers, or no liability on the Tug Kolo, I am wondering if at that point there wasn't some obligation on somebody's part to go back, either with that tug or some other tug, and get that sampan and bring it in. That is a point neither of you have touched. Is there anything to it that either of you want to develop?

Mr. Quinn: Well, if your Honor please, I don't want particularly to go into it any further, because I believe we have shown a tug without a radio out there in a situation where it cuts something loose that could be saved, and that is the negligence as far as we are concerned. That is the second aspect on which we rely for our case. I can't see anything more that we can show beyond that. I think the failure to take proper steps to salvage the vessel took place at that point. I don't know whether after that there was anything Young Brothers could have done, whether, when the Kolo makes it in, whether they could then go out and look for a half submerged craft in the middle of Molokai channel.

The Court: Let me put the reverse angle to you. Having without doubt a report from his crew, was there any obligation on your Plaintiff's part to insist that either he or somebody else go back and find out what had happened to this sampan and possibly tow it in? Was there any negligence on his part for not doing something like that?

Mr. Quinn: I don't know, your Honor. Again, I don't think that, having left a half submerged craft in the middle of the channel at 3:30, having

advised Young Brothers at 9 o'clock, presumably somebody would have—John Cho would have to find the money first to engage something to go out there and would probably have to wait a minimum of about 24 hours from the time of abandonment. The question of finding something in those waters, under those circumstances, when even our air [253] searches around here often find it very difficult, is something on which I don't see how there would be any duty. He put himself in the care and custody of another who treated him rawly, and as far as I can see he could do no more.

The Court: There is still another possible angle to this same situation to which I invite your attention. Being a "land lubber" I can ask these questions. It also occurs to me that regardless of the relationship between the parties, and so forth, that leaving this sampan awash out there all by itself in the ocean would constitute, as you have labeled it throughout the trial in a different situation, a menace to navigation.

Mr. Quinn: I think it would.

The Court: Was there any obligation on anybody's part to go out and remove that menace to navigation, and if there was, could it have been done in such a way that the menace could have been removed by towing the thing back home?

Mr. Quinn: If they could have found it, I suppose so, your Honor. That would be an obligation imputed to Young Brothers by the Coast Guard, if it had been disclosed that, in fact, nobody had



seen this sampan sink. He who leaves a menace to navigation in an area has the duty to remove it.

The Court: That obligation is owed to the Government.

Mr. Quinn: Yes, your Honor. I suppose if somebody [254] had hit that, if a craft belonging, say, to Inter-Island had struck that sampan while it was there, they might well have taken a suit in admiralty against Young Brothers for having so left it. But I do not think that any of that would accrue at all to John Cho.

The Court: No, but my thought was, if somebody had that obligation and went out there to discharge it, then they could have observed that they could have removed the thing by doing one of two things: at once removing the menace or bringing the thing home.

Mr. Quinn: Saving the vessel, yes, your Honor.

The Court: I also seem to recollect, without consulting my notes, that when Joe, captain of the Kolo, telephoned Mr. Harrison that night, all he told him was that he had lost his tow. And I think I stated, when I tried to review in a summary way, that the evidence was that the sampan had been awash and cut loose. It well might be that from simply saying he had lost his tow you couldn't tell what the situation was, or there might have been an obligation to inquire as to exactly what had happened.

Anyway, those are some of the things that are going through my mind. If there isn't anything in

them that either of you wish to develop, why, I am not trying the case, but I want to know just where I am and what I have to go on. I don't want any loose ends left. [255]

Mr. Quinn: From the viewpoint of the Libellant, I don't see how we can go any further than we have, if your Honor please, in showing the negligence of Young Brothers; and, with respect to the point you have just mentioned, I think it is credible that Joe Kahiapo, the master of the Kolo, probably thought the sampan was going to plummet down to the bottom of the ocean. I think there is an indication there from Abell's testimony that he was scared, but the fact remains that is not the way a wooden ship operates.

The Court: Then the evidence is all in on both sides?

Mr. Collins: If your Honor would care for a clarification of that 'phone call, we would be happy to call Mr. Harrison to the stand.

The Court: What 'phone call?

Mr. Collins: That you are speaking of, Joe Kahiapo, that evening.

The Court: Only if there is something you wish to go into in line with what I have been talking about.

Mr. Collins: It is just along the line you have mentioned. If you feel that the question—I had not considered it at all pertinent to this case—as to any

liability arising after the sinking itself—if you consider that that is important, I would like to have the opportunity of having Mr. Harrison testify.

The Court: All right. I am not sure it will be of importance, but let's have it for what it is worth. Those witnesses who have been excluded may now come back, if they are interested, rather than standing around the door.

### EDWARD T. HARRISON

recalled as a witness on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

#### Redirect Examination

The Court: You may sit down. You are the same Mr. Harrison who testified under oath heretofore?

The Witness: Yes.

The Court: And I remind you you are still under oath. All right, Mr. Collins, based on the Court's inquiry, you have a question you want to ask?

By Mr. Collins:

Q. Mr. Harrison, did you receive a telephone call from Joe Kahiapo on the evening of Wednesday, April 7?      A. Yes, I did.

Q. What was the substance of the conversation?

A. It was about nine o'clock at night; Joe telephoned and said that the sampan had sunk in the

(Testimony of Edward T. Harrison.)

channel, and I told him I would take it up with him in the morning. That was the entire conversation.

Q. Did he use the word "sank" and not "lost"?

A. Well, I am almost positive that that is correct. [257]

Q. That is your best recollection?

A. That is correct.

Q. And there was no further conversation on that? A. No.

The Court: All right.

Mr. Quinn: No questions.

The Court: Thank you.

(Witness excused.)

Mr. Quinn: May I clarify a point, your Honor?

The Court: Yes.

Mr. Quinn: Early in the trial I made an objection to a line of questioning about the authority of the master of the tug Kolo as being immaterial. Your Honor overruled my objection and said: "Your objection may go to that line of questioning." Perhaps it was an oversight on my part, but I more or less thought that would continue to the line of questioning of any witness dealing with the authority.

The Court: Well, I have no objection to the record's now so showing.

Mr. Collins: I have no objection, your Honor.

Mr. Quinn: I had more or less in the back of my mind assumed that should have been done, but I should have taken it up.

The Court: Let the record show that objection went to that line regardless of who was expressing it. [258]

Mr. Quinn: Yes.

The Court: Are you prepared to argue the case this afternoon?

Mr. Collins: My suggestion would be, your Honor, if I might be so bold, that I think, because this admiralty is a matter on which I am sure Mr. Quinn will admit he is no experienced practitioner, and I also must admit to being in the same position, it might be helpful to the Court if memoranda were submitted to you, particularly on the points on which we are so strongly at variance. And upon submission of that memoranda, I think then a summing up of the evidence might become more valuable.

The Court: How do you feel about it?

Mr. Quinn: Well, frankly, if the Court please, I have no serious objection to that, except that I would like to be in a position where I didn't have to order a transcript at the expense of my client in order later to prepare a summation of the evidence. That is the first point, and the second point is: I am still at a loss to find what Mr. Collins is driving at in the face of the definitely and deeply established principle in the law of admiralty with respect to proceedings in rem, a question of authority vel non of a person in rightful possession of that vessel. I would be prepared to state that right now. I think it is so firmly established in the

law that any search would be into the intricacies of strange and esoteric principles rather than the warp and woof of the law of admiralty.

The Court: Perhaps I might be able to simplify the task of both of you by pointing out what seems to me to be the situation.

I have rather detailed notes, and I don't think it necessary for either of you to order transcripts in order to summarize, for with your notes and mine, I am sure we can get pretty close to the facts. In fact, I *would prepared* to state what the facts are now. And there isn't any great dispute in the factual area as I see it.

Without indicating that these are the final findings of fact, but simply as a brief outline of the way the thing looks to me at the moment, and without binding the Court as to the applicability of the law of Admiralty, but just on general principles, I can not see with any clarity, at least from these facts and the evidence presented here, where it could possibly be contended by anybody, and I don't think it is, that the towage of this "Tenyo Maru" from the pier at Kaunakakai after it was removed from the reef to Honolulu, or in that direction, by the Tug Kolo was authorized by Young Brothers.

Now, whether or not, despite the lack of authorization to the captain of that tug boat, Joe, Joe, nevertheless, as tug boat captain, had ostensible or apparent authority, to borrow a phrase from the law of agency, to go ahead and do it [260] anyway, and that possibly, therefore, he having done it, Young

Brothers might be liable, I don't know. But Young Brothers isn't being sued. It is the tug itself that is being sued. Maybe Joe, as captain, had the authority nevertheless, regardless of his relationship to Young Brothers, his employer; that the relationship to the tug, I say, could bind it, I don't know. But I am reasonably well satisfied that this was a venture on Joe's part with his tug and that Young Brothers had not authorized it or made any contractual arrangements for it.

I am further fairly well satisfied that, taking into consideration wind and weather, both Joe and the Plaintiff either knew, or should have known, that grave risks were involved in towing that sampan in its then condition from Kaunakakai to Honolulu. And I am mindful of the testimony of Captain Ho, as amended by Mr. Collins' questions to him, that finally came to this: that if patched, at Kaunakakai, then, in his opinion, the Tug Kolo could have towed the Tenyo Maru to Honolulu. The fact is it was not patched. The Plaintiff knew it and Joe, the captain of the Kolo, knew it.

Now, in the law of admiralty is there any rule that would make negligence and contributory negligence offset one another?

Mr. Quinn: If I may be heard, your Honor, there is a considerable and well established line of authority on this very question, on taking an unseaworthy craft in tow. And the cases start with a very local case in the Federal Courts of the [261]

Steam-Tug William Murtaugh, 3 Federal 404; (1880).

The Court: Are there any modern cases on this?

Mr. Quinn: This is the leading case, your Honor, and every case thereafter refers to it.

The Court: That page again on Murtaugh?

Mr. Quinn: 3 Federal 404. The law of admiralty in this connection, your Honor, has not changed. I have the leading cases on the subject, and there is an extensive annotation in 54 ALR 101. But the general ruling, getting back to the Court's question, is that when a tug takes a tow which was unseaworthy and which the tug owner knew, or should have known, was unseaworthy, and during the course of the towage the tow is lost, by virtue of that weakness, then, the tug is liable. Now, it is further held that when the tow owner knew, or should have known——

The Court: (Interrupting) ——Also.

Mr. Quinn: (Continuing) ——that it was unseaworthy, that then the tow owner is also negligent; and, pursuant to the general well founded rules of admiralty, the damages will then be split.

The Court: Between the——

Mr. Quinn: Between the tug owner, or the tug, and the tow owner. And these cases all hold, if those are the findings, that the owner of the tow is entitled to one half his damage. [262]

The Court: Well, just briefly, I would like both of you to consider that rather seriously, for, off-hand, it looks to me as if that might well be the situation here.



Mr. Quinn: Well, I had certainly had that situation in mind, your Honor, but I think there are other things that ought to be taken into consideration, which your Honor has previously pointed out, and that is whether or not there were adequate and proper steps taken to salvage this vessel when it was awash.

The Court: Well, how can you go into that now? It is not part of your pleadings.

Mr. Quinn: It is part of my pleadings, your Honor.

The Court: Oh, it is?

Mr. Quinn: Yes, your Honor.

The Court: I haven't been conscious of that.

Mr. Quinn: If it is not stated expressly enough for the Court, I would strongly ask for right to amend under the rules of admiralty, which I think would give me that right at any time. But I believe it is clearly stated in Paragraph Seventh, subparagraph (3) "In failing to take proper action when advised that the vessel was taking more water than she could pump; (4) In other faults to be shown at the trial of the action." I believe that is all I need to show they didn't salvage it properly. If it was too broad, Mr. Collins would have had a right to except and force a more particular statement. [263] I have alleged taking an unseaworthy tow, towing the leaking vessel through the waters of the channel and failing to take proper action when advised that the vessel was taking more water than she could pump.

Now, it is true that there are facts that have come out during the course of the trial, and if the Court finds this is too broad an allegation, I would now request the right to amend to make the pleadings conform to the proof as having been presented to the Court.

The Court: Your whole theory is based on a proposition of law which I haven't yet examined, but I gather from your remarks during the trial that irrespective of Young Brothers and the authority it may or may not have granted to its tug captain or allowed the tug captain to display, even though unauthorized, that you, in point of law, believe Young Brothers can be eliminated from the picture entirely, as they are not in the picture you drew in your pleadings, and we look solely to the barge.

Mr. Quinn: Yes, sir.

The Court: Or the tug.

Mr. Quinn: Yes, sir.

The Court: Whereas Mr. Collins, if I understand his position correctly, undertakes the defense by running his line in such a way that he is trying, perhaps has successfully shown that this was wholly unauthorized and that Young [264] Brothers is not liable; but he doesn't seem to me to get to the point of meeting you on your tug issue.

Mr. Quinn: I might point out that Mr. Collins would be entirely correct, if we had brought a suit in personam, that there is no doubt, if it were unauthorized, we would be barred. In fact this is a suit in rem.

True, Young Brothers came in as a claimant, but the liability tried is the liability of the Kolo.

The leading case on that is *The China*, which is an old case; but you will find the admiralty cases are largely old ones. *The China*, 7 Wall 53; 17 Law. Ed. 67. I am sorry, your Honor, 1868. And that was the case where the American authorities first split from the English authorities on this question; and that was the case of compulsory pilotage where the vessel was required by law to take a pilot and had no choice, could not direct his actions; the pilot was negligent, and the question before the Court was: Could the vessel be held liable under those circumstances? Held, so long as the person is in lawful possession of the vessel, he may render the vessel liable.

There is an article in 19 Harv. L. R. 445, *Respondent Superior in Admiralty*,—I take it that is exactly what Mr. Collins is relying on, that there can be no respondent superior in this case.—which is quoted in Robinson on Admiralty, page 365, that “liability in rem has no connection with the law of [265] master and servant, or with the maxim respondent superior.”

It has then been carried that a charterer, if the Court please, having no authority whatsoever from the owner to do anything except under contract, handling his own operations, which might be one single trip or voyage from Honolulu to Hilo to carry certain goods and back and turn the vessel over—en route the captain selected by the charterer

has a collision; the vessel is held. It so frequently appears in numerous connections in the law of admiralty that when you have a suit in rem the only question is whether or not the person in possession was in lawful possession. They will not extend it so far as to hold the vessel when a thief is in possession and is negligent, but anything less than a thief can render the vessel liable in negligence.

In The China the Court is reported—and I did not bring my brief of The China and other cases with me, but the Court, it is said, denied the China's contention that the matter rested upon the general legal principles that one shall not be liable for the torts of another person which is imposed upon him by law and is therefore not his servant or agent. A decree for the Libellant is affirmed. The owner's vessel is always a pledge to any person with whom the ship's possessor has such dealings that a cause of action against the ship would arise. Now, there are numerous cases which will follow that under receiverships, charters and cases of an authorized master. An authorized master is perhaps one that wouldn't even follow within the doctrine, since a master would probably have apparent authority at all times. But that, I think is very clear, and it is on that doctrine that we rest our belief that the authority given by Young Brothers to Joe Kahiapo has no materiality in this case.

The Court: I repeat, and I think perhaps Mr. Collins will agree with me when I ask him in a moment, that it strikes me that both of you are trying

this case on entirely different theories, and that is the big thing that will have to be decided.

I think it might be helpful to have all of us examine these questions. I will let you outline your theory of the case, Mr. Collins, in a moment, but before you do, for the guidance of both of you, these strike me as being the facts which may well ultimately be found. I want to leave it open. I don't want to bind myself too closely here, but it strikes me that the pulling of the Tenyo Maru off the reef at Kaunakakai was authorized, and on that phase of it, it is completely out of our operative actions. We don't have to bother with that, so that our situation becomes important at the time that the sampan was pulled off that reef. And we know as a fact that it was taken into the harbor at Kaunakakai. Let us pass over the question as to whether or not that was the right place to take it, or whether it was a safe harbor, or whether the salvage [267] operation was then concluded. The fact of the matter is that that sampan was tied up at the pier at Kaunakakai, and it was leaking and leaking so badly that they had to use a gas pump to keep the thing afloat; and, without any repairs being made to it, the next day, without authority, the captain of the tug boat Kolo undertook to tow that sampan in that condition to Honolulu; and the owner of that sampan, who was then and there present at that pier at Kaunakakai when his sampan was taken in tow, as I have just described, also knew that the sampan was leaking badly and in

need of continual pumping; and I feel that he either knew or should have known everything about that situation that the captain of the Kolo either knew or should have known. And we find further from the facts that when that tug got that sampan out in the channel, due to some circumstances that none of us know anything about, whether it was wind and waves, or inexperience of the crew aboard the sampan, failure of the pump, or a combination of circumstances, or whatever it was, we find that that sampan became awash. And I am satisfied in my own mind that the captain of the tug Kolo became scared and excited and perhaps in too great haste cut loose the tow and picked up the crew and left the awash sampan adrift, and returned to Honolulu.

I repeat myself briefly. Those to me are the principal facts upon which we are going to have to decide this case. They are not the final facts that I may find, but for the help [268] and guidance of you gentlemen in arguing your case, I think I should, in fairness, point out my view of the thing as I sit here and listen to it.

Now, Mr. Collins, is there anything you would like to say in having heard Brother Quinn outline his theory of the case?

Mr. Collins: I think your Honor is familiar with our theory, but I don't think it can be brushed aside as clearly as Mr. Quinn indicates. As I say, this is a matter I would like to furnish a brief for.

Briefly, we have been relying in our position on

certain cases that have involved tows, involved tug boats taking tows where the captain of the tug boat was without authority to take the tow; and those cases are where it was clearly beyond the authority of the captain and was known by the owner of the tow to be beyond the authority of the captain of the tug. In those cases the libel has been dismissed. Those cases that come to my mind immediately are the cases of *The Andrew J. White*, 108 Fed. 685, where the Court found there was a wrongful assumption of authority by the master of the tug in taking on the tow——

The Court: Incidentally, I am not sure I stated that, but I am satisfied that the captain of the *Kolo* had no express authority to take on that tow. Have I stated that?

Mr. Quinn: I think you did, your Honor. There is no finding as to knowledge or lack thereof on the part of [269] John Cho with respect to authority that was represented to him.

The Court: No, I haven't covered that.

Mr. Collins: There is the case of *The R. F. Cahill*, a rather early Federal case; Federal Cases No. 11,735, in 1878, where there was again a libel, which involved a towage contract between New York and South Amboy to Fifty-first Street, and after they got up to that point, the owner of the tow asked the owner of the tug to carry him to further point. The owner of the tow knew that the owner of the tug didn't have the authority to do it, and the owner of the tug knew he didn't have the authority to do

it. They took it upon themselves to go up that additional four or five blocks, and the damage occurred in that extra run. The libel was dismissed.

There was a further case, *The Oceanica*, 144 Fed. 301. Now, in that case it involved a towage contract with barges up around Buffalo, New York, and the arrangement was that the tow was to be between two spots. Again there was the same situation. The tug master and the owner of the tow got together and agreed it should go beyond that. The lower court permitted the Libellant to recover. On appeal that was reversed and certiorari was denied by the Supreme Court.

So we are not at all satisfied Mr. Quinn's cases are correct. Those are the only cases I have been able to find that involved the question of authority. In each of those cases there has been a dismissal of the libel, on the basis that [270] the master of the tug was acting without authority and the owner of the tow knew it.

The Court: All those were libels of the tug?

Mr. Collins: All those were libels of the tug.

The Court: In rem?

Mr. Collins: Yes, sir.

The Court: Well, I still wish there were a modern case.

Mr. Collins: This is a crucial point, and we are perfectly happy to submit briefs to explore all of the possibilities on it.

The Court: I will take it under advisement, and you gentlemen can either give me a list of the cases



you want me to read or give me a short memorandum. It doesn't have to be exhaustive. After I have digested those, if you would like to come back and argue your cases, I would be glad to give you time. By that time I hope to have prepared the final findings of fact, and if I have them prepared sufficiently in advance, I will give you copies of them for your guidance in arguing.

How does that strike you?

Mr. Quinn: That is satisfactory to me, your Honor.

Mr. Collins: Shall we set any tentative date for the memoranda to be submitted to you?

The Court: Yes. What would you like?

Mr. Collins: I would suggest a week at the outside. [271]

Mr. Quinn: Ten days, if the Court please. I have another case coming up that is going to take some time.

Mr. Collins: That would be agreeable to me.

The Court: In other words, the same ten days for both of you to provide the Court with memos and to exchange. I don't see any need of counters.

Mr. Collins: I assume you do not wish us to go into the question of splitting liability as proposed by Mr. Quinn, to which we have no argument if negligence is found on the part of both, that the damages will be split equally.

The Court: You do not need to go into it, but I would like you to give me a few references that express that principle of admiralty law.

Mr. Quinn: If I can work out some way that Mr. Cho can be entitled to more than 50 per cent, I don't want to be foreclosed from making that assertion. In other words, if the Court should find that the negligence on the part of the tug owner exceeded that of the tow owner, I take it this Court could give an increased percentage to the tow owner. But, at any rate, we will brief that question and act accordingly.

The Court: That is a principle that is foreign to me and is peculiar to the law of admiralty, apparently; so if we ever reach that, I will hear you fully on it, but, in the meantime, in your memos you can just touch on it by way of giving me cases you would like me to read to familiarize myself to the extent of the principle and its application.

All right, ten days from today for the memos.

Mr. Quinn: Very well, your Honor.

The Court: What would that be, Mr. Clerk? Supposing, rather than a strict ten days, that you have your memo filed by May 9, which I think is twelve days, but there is a Sunday or two in there.

Mr. Clerk, what is my schedule? Do we have anything on the 12th or 13th?

The Clerk: No, your Honor, not the 12th or 13th. You set the case this morning for the 16th.

The Court: The 12th is clear?

The Clerk: Yes.

The Court: Supposing you plan to come in and argue the matter briefly on May 12.

Mr. Quinn: Very well, your Honor.

Mr. Collins: That is satisfactory, your Honor.

The Court: All right, ten o'clock for the argument—or nine; which do you prefer?

Mr. Collins: I would prefer nine o'clock, your Honor. General principles.

Mr. Quinn: That is very satisfactory, provided it is satisfactory with the Court.

The Court: And if, on checking with your office calendars, you find that that is not a good date, arrange [273] among yourselves and with the Clerk, but unless I hear from you, it will be the 12th at nine for argument.

(Thereupon, at 2:35 p.m., April 26, 1949, hearing in the above-entitled matter was adjourned.) [274]

May 23, 1949

The Clerk: Admiralty No. 409, John Cho vs. The Tug Kolo.

The Court: I understand you wish to make a motion to reopen, Mr. Collins?

Mr. Collins: Yes, we do, your Honor, to present some further evidence on the question of the buoyancy of sampans and the general problem of sinkings.

The Court: Have you any objection to the motion's being granted?

Mr. Quinn: Yes, I have, your Honor, unless there is some showing made. Certainly I am fully aware that this matter is one that lies within the Court's discretion, but that, of course, is a con-

trolled discretion; and in the absence of some showing that Mr. Collins in some way was precluded from putting this evidence on at the time of the trial, I think it is asking too much to reopen at this stage. The briefs have been filed and the oral argument has been had on the case. It seems an undue imposition on the Court and, I think, on my client and myself to reopen on questions which were fully explored at the time of the trial, and on which Mr. Collins had every opportunity to put on whatever evidence he saw fit.

The Court: Well, let us review the matter briefly since the submission of the arguments—Let me go back a bit [275] further. During the course of argument I ventured a statement of certain facts in my own personal experience with respect to boats of much smaller size on fresh water. Subsequent to the argument Mr. Collins came to see me and said he was quite concerned about my experience in that respect, and also that it had led him—if I can recall the substance of his comment—to think it might be advisable to put in additional testimony on the floatability of sampans. And I asked him if he had consulted you and he said he had not as yet. I told him to do so; if there was agreement on the thing and you wanted to reopen, I would be willing to do so. Isn't that the substance?

Mr. Collins: That is the substance.

The Court: So here we are. I thought you gentlemen had been in agreement.

Mr. Quinn: Well, perhaps my own interpretation of my subsequent conversation with Mr. Collins was in error. Mr. Collins told me the Court had granted him the right to reopen, in the light of which I said "all right"; but I was prepared to ask this morning why there had not been a motion to reopen and an opportunity for me to be heard. If this is the motion and if I can be heard, I will state, as I have just stated, I came into court thinking there was an agreement. Apparently there wasn't. Perhaps in the light of that Mr. Collins might wish to amplify the ground of the motion. There has been some misunderstanding somewhere. [276]

Mr. Collins: There apparently is, and I am very sorry. It was my intention to convey to Mr. Quinn the idea that if it was agreeable to him, you had expressed your agreement to go ahead with it, following the suggestion of the Court.

The reason why we felt it would be desirable to amplify in this connection was, as I had stated, I can see there might have been some pre-notions on your part that we wished to dispel; and because there did not seem to be a sufficient clarity of proof in the matter of the sampans and the general seaworthy condition and the buoyancy, or whatever the technical terms might be, to be of assistance to the Court in arriving at its decision, we thought it well that this matter be brought further. It is on this basis that we ask at this time that we be permitted to do so.

Mr. Quinn: Well, it is true, your Honor, that the Tug Kolo and Young Brothers and Mr. Collins didn't see fit at the time to put on any evidence with respect to the buoyancy, but they heard our testimony. It was there. It was presented before them. And if they saw fit to undertake to disprove it or to rebut it, there is no showing that they had no opportunity to do it at that time. Instead, they submitted their case, I suppose on the theory on which they had proceeded from the outset, that is, that it was immaterial.

The Court: Apparently, based on that comment of mine during the course of argument, which I won't repeat—I [277] think you will remember also.

Mr. Quinn: Yes, I do, your Honor.

The Court: I think that caused Mr. Collins to become more concerned on the point than previously, and that is the motivating cause for coming on with this motion now.

Mr. Quinn: Your Honor, I think it is possible that before then Mr. Collins had assigned absolutely no weight to the testimony we had put on, but I don't think that the Court indicated it was going to take judicial notice of the fact that sampans would never sink.

The Court: No. I have also told Mr. Collins that my own personal experience on fresh water has nothing to do with this case. It just happened to be a reminiscent thing that occurred to me as you all were arguing. But, on the other hand, on this question of whether or not sampans awash can

remain afloat for a period of time there is an issue on which the Court certainly wants the best help from both of you that it can get.

In reviewing what is presently before the Court, regardless of the source from which it comes, I agree with you that Mr. Collins offered none. You offered the experience of a sampan owner, who very religiously refused to budge beyond his own experience. He said that all he knows was that his sampan, with its front part cut off, didn't sink and was able to be towed from Barbers Point to Kewalo Basin. [278]

Then you had the man from Child Marine, and, without reviewing my notes recently, my recollection is that the most he said was, not that sampans wouldn't sink, but they did have great powers of remaining afloat, even though they were awash. Am I wrong?

Mr. Quinn: Yes, your Honor, I believe you are. I think he went so much further as to say, not that they couldn't sink, but as a rule they would not, at least a sampan as described as this one here. And there is the further fact that the other sampan owner did testify that his sampan was almost exactly like the one in question here, so that adds to his individual experience.

The Court: Well, that rephrasing of his testimony doesn't jar me. I will review it here in a moment. I wanted also to mention there was still one other person, namely, the little Filipino aboard the tug who suggested to the tug captain that he shouldn't cut the—what-do-you-call-it?—winch?

Mr. Quinn: The hawser.

The Court (Continuing): —for it would remain afloat. But of those three sources of information the only one that strikes me as being particularly reliable would be the testimony of that man from Child Marine. What was his name?

Mr. Quinn: Leary. Robert Leary.

The Court: While I am looking for this in my notes, [279] Mr. Collins, would you like to explain why during the course of the trial you didn't put on any testimony of this sort at all.

Mr. Collins: If your Honor please, the position in which the Libellee found itself was that at the conclusion of the first day's testimony, the only evidence that we had had was the evidence of the owner of the sampan on the towage from Barbers Point to Kewalo Basin. As far as the testimony that had been made on the tug was concerned, it was my recollection that it was stricken; he was not an expert. As a consequence, on the second morning when the evidence was introduced, that was really the first time we had any expert testimony attempting to go into the question of buoyancy of sampans and the possibility of their sinking.

The Court: Child Marine man Leary?

Mr. Collins: Yes, your Honor. At that time it was the feeling of the Libellee that as the evidence then stood there had been no proof, adequate, proof, made by the Libellant, and the cumulative effect of that evidence, together with the subsequent state-



ment that the Court made, put the Libellee in a position where he felt that affirmative evidence would have to be introduced by him in order to clarify the situation and also because the matter at that time, standing on the testimony alone, was in a confused condition.

The Court: In a nutshell, my comment during the [280] course of the argument bothered you then and bothers you now?

Mr. Collins: It did then, yes, sir; it does now, yes, your Honor.

The Court: Even though you can agree with me that when I tell you that it would have no effect on the decision, should I agree with Brother Quinn, you will never believe it didn't?

Mr. Collins: I would hesitate to say that, your Honor, but I think experiences of that nature are bound to influence the analysis that is made of the testimony even though a conscious attempt be made not have it influence it.

The Court: I have Leary's testimony reviewed here. In substance, he said a sampan awash does not normally sink, and they remain awash regardless of the sea; the waves do not bother—on direct examination. And on cross-examination: Sampans don't normally sink; they remain awash.

Mr. Quinn: Your Honor, it seems to me pretty unusual that Mr. Collins would assert the Court as putting a lesser burden of proof on the Libellant because of a statement about canoes or small boats on fresh water lakes. The only solution there,

as far as I can see, is not to make believe now to put on evidence because of that statement, despite the Court's obvious freedom from any preconceived notion with respect to sampans—if there is a preconceived notion, Mr. Collins' remedy or suggestion is obvious; but there is not. It is just to beg [281] leave to accumulate more evidence which he didn't see fit to put in the first time, merely because the Court has commented on how canoes float.

The Court: Flat bottom boat.

Mr. Quinn: Flat bottom boat with logs in it.

The Court: Well, on the other hand, I am concerned that what I said bothered him then and bothers him now, and I don't want any doubt remaining in this picture. If this subject is one of expertness, what danger to you can there be if another expert gives his opinion?

Mr. Quinn: There is no danger, your Honor, except the usual danger of conflict of experts. If there is further testimony, I shall have to beg leave for rebuttal testimony on the same subject. In the meantime, the whole matter has—we thought—been finally concluded, with briefs, oral argument and everything over, merely awaiting the determination of the Court, and to reopen on that question now——

The Court: Let me interrupt. If you thought I had granted the motion to reopen, why didn't you come prepared today with additional expert testimony?

Mr. Quinn: I told Mr. Cho that we would have our experts ready. He has the names of them, and if it is necessary to go into it further, we will; but I was going to make some statement here, even if the Court had granted the motion, and I wanted the record to show that I didn't think it was [282] proper that it should have been granted without my having been heard on the matter.

The Court: Well, I am not sure that you haven't got the better of the argument on a technical point, but because I, too, am disturbed that Mr. Collins is disturbed over a remark I made during the course of argument, I am going to let him reopen to introduce testimony on this point, and this point alone. And you can have all the time you want to give me additional testimony on the point, if you wish to. I do hope we can have it in the next day or two so we can clean this matter up, but I don't want anybody leaving this court room, based on any side remark of mine, thinking, "Sure, he says he won't consider that, but it is humanly impossible not to, and we didn't have a fair chance to correct the situation." So, I think, by interjecting a personal experience of mine into the thing during the course of argument, that I would feel better if you both have an opportunity to give me anything else on this subject that you want, because what I want are all the facts from which I can draw proper conclusions. I don't want anybody leaving the court room under any misapprehension as to where I get my facts.

Do you think that is fair enough?

Mr. Quinn: Well, your Honor, I will certainly abide by the Court's ruling, but, in usual Irish fashion, trying to get the last word, if it took Young Brothers three weeks to find an expert that would so testify, I think it would be very [283] prejudicial to the Libellant that they be allowed to bring him in, but I will certainly abide by the Court's ruling.

The Court: I think I will open it up for both of you. I will feel better about it.

Mr. Collins: Mr. Holm.

### CARL HOLM

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name, age, residence, occupation and citizenship.

The Witness: Carl Holm, vice president of Hawaiian Tuna Packers, 4989 Kalaniana'ole Highway. American naturalized citizen.

The Court: You are an American citizen whether you acquired that status by naturalization or by birth.

The Witness: That's right.

The Court: So, you do realize you don't have to advertise the fact that you are naturalized? I appreciate your frankness.

The Witness: I don't know that.

(Testimony of Carl Holm.)

The Court: You are an American citizen. That is all you have to say. And you are such exclusively? Only?

The Witness: I appreciate that, your Honor.

The Court: And there is just one thing you didn't [284] tell me, your age.

The Witness: Forty-six.

The Court: Take the witness.

### Direct Examination

By Mr. Collins:

Q. Mr. Holm, what is your present occupation?

A. I am vice president in charge of production, Hawaiian Tuna Packers.

Q. What is the nature of the work you perform at Tuna Packers?

A. In addition to that, manager of the Hawaiian shipyards in connection with Hawaiian Tuna Packers.

Q. Does your work bring you in contact with sampans?      A. Yes, to a great extent.

Q. What was your occupation before becoming affiliated with Tuna Packers?

A. Immediately before that?

Q. Yes.      A. Naval officer.

Q. And what were your duties as a naval officer?

A. Beginning of the war as consultant and salvage. Design of salvage matter to the Bureau.

The Court: Assigned?

The Witness: Designed—of salvage.

(Testimony of Carl Holm.)

The Court: Designed? [285]

The Witness: Yes.

A. (Continuing): In the latter part of the war in charge of salvage and rescue and towing in forward area.

Q. Will you explain to the Court what some of your duties were in your assignments in salvage and rescue work?

A. I was in charge of Task Group 51.6, and all the duties in connection therewith was that of towing and rescuing ships in distress in forward area.

Q. Did you have an occasion to train any men on towage work during that period?

A. Young officers that were sent out from the States had to be trained and instructed in salvage and towing, yes.

Q. Did you, in the course of your assignment with the Navy, have any occasion to write any articles or material on towage work?

A. I wrote for the salvage school in New York, articles——

Q. Have you had any published articles besides those?

A. Published under the name of the Bureau of Ships, yes.

The Court: That is the Navy?

The Witness: Navy, yes.

Q. (By Mr. Collins): What was your occupation prior to going into the Navy?

(Testimony of Carl Holm.)

A. I was president of the United States Marine Salvage Company in Florida. [286]

The Court: Florida?

The Witness: Florida.

Q. (By Mr. Collins): How many years would you say you had been in salvage work?

A. I was trained in salvage work in the Royal Danish Navy, and started the United States Marine Salvage Company in 1927, I believe it was, and continued that corporation until 1936 or '37, when I went into the Bureau of Ships in '34—no, 1940, it was, as civilian, and under contract to the chief of the Bureau of Ships.

The Court: Training in salvage work began in the English Navy?

The Witness: Danish.

The Court: Danish?

The Witness: Danish, your Honor.

Q. (By Mr. Collins): Mr. Holm, I show you Libellant's Exhibit No. 1 and ask you to read the portions of it dealing with the characteristics of the Tenyo Maru.

Mr. Quinn: If the Court please, before Mr. Holm is offered as an expert on this matter, I wonder if I might cross-examine him on his qualifications?

The Court: You may.

The Witness: Yes.

The Court: Mr. Quinn has some questions of a general nature. [287]

(Testimony of Carl Holm.)

The Witness: All right.

### Voir Dire Examination

By Mr. Quinn:

Q. Mr. Holm, during your experience with Task Group 51.6 and elsewhere with the Bureau of Ships, did you have any experiences with wooden ships?

A. Landing craft, yes, a major portion of the salvage vessels with wood hulls.

Q. With wooden hulls?

A. Wooden hulls. I wouldn't say the major part, but I think 30 or 40 of the ships we had with wood hulls.

Q. Were there any in similar design to sampans that you had experience with during that period?

A. No.

Q. United States Marine Salvage was operated in Florida, was it?

A. Yes.

Q. Did you have any experience with sampans in Florida?

A. None, no.

Q. Is a sampan a particular design of wooden craft?

A. It is in respect to the sponson only, and perhaps cleaner lines.

Q. The sponsons don't appear on the normal wooden ship; is that right?

A. That is right. [288]

The Court: What are they again? I have heard about sponsons in this case, and I think I know what they are, but will you tell me what they are?



(Testimony of Carl Holm.)

The Witness: Well, having designed sampans for Hawaiian Tuna Packers, we feel in general they are useless for any other purpose but that of keeping people's feet dry a little longer than ordinarily. They are not, as people in general think, buoyancy chambers. They are, in general, covered with loose boards that are simply covers over lockers within the sponsons. They do assist in keeping spray, in keeping breaking seas from entering into the deck as a result of their protrusion from the hull in the section of the ship.

Q. (By Mr. Quinn): Are they solid or hollow?

The Court: Solid or hollow?

The Witness: They are simply a box built out from the side of the ship. They are not a buoyancy chamber.

Q. (By Mr. Quinn): When you say they are not a buoyancy chamber, do you mean they are not water-tight boxes?

A. They are water-tight as far as spray is concerned, but they are not a closed chamber which would act as a buoyancy chamber in case of sinking.

Q. You mean if they rested on the water, the water would go right in them and sink them?

A. That is right, in general, unless there is some special design in question. In general they are simply a box [289] extending from the side of the ship and secured to the side of the ship, and boxes built within the sponsons has lockers for vegetables and what-have-you.

(Testimony of Carl Holm.)

Q. You say you design sampans?

A. Yes.

Q. While you were with Tuna Packers?

A. Yes.

Q. Is it all a standard design, or are there variations within the class?

A. The latest one we launched, Sooty-Tern, 85-foot sampan—I might clarify this and the Court's question relating to sponsons. Sponsons are used on canoes also, but as closed buoyancy chambers. In other words, they are not at any time open and they will act as reserve buoyance in case the ship is filled with water.

Q. They open from the inside?

A. Not the canoe sponson.

Q. The sampan?

A. They open from the deck level.

Q. They open from the deck level?

A. Yes.

Q. And is that where you postulate that the water would enter?

A. Yes. It perhaps wouldn't enter from the outside of the hull if the sponsons are not damaged, but it would enter if [290] the sampan is deck to and rolling and see-sawing, slushing over.

Q. In other words, if the ship sank, the sponsons would fill?

A. I am there again referring to the general design. I don't know that the one in question had any special buoyancy chambers.

(Testimony of Carl Holm.)

Mr. Quinn: I have no further questions.

The Court: All right.

Direct Examination

(Continued)

By Mr. Collins:

Q. You have read the exhibit, Mr. Holm?

A. Yes, sir.

Q. Assuming that you had a sampan of those characteristics that had been on a reef from Saturday until the following Tuesday afternoon, two tugs were required to tow her off, a hole in the hull was discovered below the water line of approximately three inches wide and a foot and a half long, that her entire hull was not inspected or sounded after being taken from the reef, assuming that a pump operated continuously from six o'clock at night until the following morning to pump out the water, a bridle had been put under her to keep her afloat while at the pier, assuming there was no patch over the hull, she was towed for some four hours into the channel between Molokai and Oahu, assuming the channel was of average roughness, the [291] wind a bit brisker than average, assuming the fuel tanks were about half full, that she had no load, in a period of approximately half an hour she settled from a roughly normal position to one where her decks were awash, all compartments were flooded and only the deckhouse and four or five feet of the bow were above water, in your opinion would such a sampan sink?

(Testimony of Carl Holm.)

A. I would have to answer that question with "I don't know."

Q. What would you require in order to give an opinion as to whether the sampan would or would not sink?

A. In order to answer that question I would say that two factors would be required, that of the buoyancy left in the wood and that of the weight involved within the sampan.

Q. As far as the buoyancy of the wood is concerned, is that observable from observation?

A. No, that could only be determined by lengthy tests. I would say the older the sampan or any wood hull gets, the more water logged, of course, the wood becomes, and the factor becomes lower and lower within the wood itself, inherent in the wood.

Q. Is it possible that the buoyancy of the wood in this particular ship could be sufficiently low so that she would sink?

A. I am sorry. I didn't get that.

Q. Is it possible that the buoyancy of the wood in this [292] particular ship could be so low that she would sink?

A. It is possible.

The Court: Just a minute.

Mr. Quinn: I object to the question, your Honor. The expert hasn't been given the information to respond to that question as to the condition of the wood. The Court will recall there was a major overhaul in 1944 and upkeep every two months or so from 1946 to the time of sinking.

(Testimony of Carl Holm.)

The Court: I think the objection is well taken.

Q. (By Mr. Collins): Assuming that this sampan had had a major overhaul in 1944, that she had been kept up during the intervening period, is it still possible that the buoyancy of the wood could be sufficiently low so that this vessel could sink?

A. It is possible, yes. However, there again it depends on the weight factors involved.

The Court: By that you mean the weight of the load the ship was carrying?

The Witness: Its engines and its piping, its auxiliaries and rudder and propeller and skeg and shaft and many other things, your Honor.

The Court: Including its cargo, if any?

The Witness: Cargo, if any; that is, if the cargo is of negative buoyancy, such as iron, for instance and such as—well, anything of negative buoyancy, anything that wouldn't [293] float would, of course, add to the weight in the ship and would sink it sooner than if there was no cargo.

The Court: Well, I think Mr. Collins might also have told you in his hypothetical question that it didn't have cargo. I think all it had was its usual equipment and two or three people in the boat.

Mr. Collins: That is correct, your Honor.

Q. (By Mr. Collins): With the facts that have been given to you, in your opinion could a sampan in this condition be towed to Honolulu and safely beached at the nearest point of land, assuming it to be some eight or ten miles away?

(Testimony of Carl Holm.)

Mr. Quinn: If the Court please——

The Witness: What again——

Mr. Quinn: There is nothing in evidence that the nearest point of land was eight or ten miles away, to the best of my knowledge. I am asking; I don't recall.

The Court: That didn't sound familiar to me either. What do you have in mind? Eight or ten miles from where?

Mr. Collins: The nearest point, as I understood it, was at the point in Molokai. She was in the channel headed toward Honolulu; she had been out four hours.

The Court: You are visualizing that it might have gone back to Molokai?

Mr. Collins: The question is whether she could have stayed afloat sufficiently long either to be towed to Molokai [294] and beached there or towed to Honolulu and beached at the Island of Oahu.

The Court: Will you restate that question; I am confused.

Q. (By Mr. Collins): Assuming the facts that have been given to you, in your opinion could this sampan have been towed to Honolulu or safely beached at the nearest point of land, assuming the same to be eight or ten miles away?

The Court: I don't like that question. I am going to object to it. I think you have two questions. The first is, Could it have been towed to Honolulu?—meaning from Kaunakakai; isn't that the point?

(Testimony of Carl Holm.)

Mr. Collins: Well, it was out of Kaunakakai.

The Court: Well, I don't think you make it clear to the witness at what point and in what condition you are picking up this ship and looking at it and asking the question. Are you assuming it to be in a certain position and in a certain condition when you ask that question?

Mr. Collins: We are assuming it to be in the condition in which it has been previously described.

The Court: Well, that is in the Molokai Channel, awash, with just a little bit above the water?

Mr. Collins: Yes, your Honor.

The Court: All right. Now your question, now that I have that straight: Could it at that point, in that condition, [295] have been towed safely to Honolulu or to the nearest point of land on Molokai, some eight or ten miles away?

Mr. Collins: That is correct.

The Court: Do you so understand it?

The Witness: I understand it, your Honor.

The Court: All right.

The Witness: My answer to that question again would have to be "I don't know." It depends on many factors involved.

Q. (By Mr. Collins): For an answer to that question would you have to know the buoyancy factors again?      A. That's right.

Q. Assuming that all of the facts that we have given you exist, that the sampan is where we have described it, in your opinion, if the master of the

(Testimony of Carl Holm.)

tug should cut the towline, would such cutting of the towline be good judgment?

A. Cutting of a towline, with a tow adrift, is always the privilege of a captain of a tug, inasmuch as if the tow is sinking, the safety of his ship is at stake, to the extent that if the weight involved in the tow submerged is sufficient to overcome the stability factor in the ship, when it is hanging over the side, that the towline generally will when the weight comes on it, rather than towing, the danger is that of capsizing the tug. I don't know the size of this particular tug involved, but I can readily see the master's concern over his ship's safety and perhaps that of the crew of the sampan, along with [296] that of his tug, if he lost both ships by reason of the fact that he guessed wrong on the weight of the tow involved. I don't know if that answers the question.

The Court: You touched on the thing I asked in the course of argument, and the answer in argument was that that was not in this picture at all. Remember my asking you that question?

Mr. Quinn: Yes, your Honor. This was a surprising statement to me, because it has been indicated, as was indicated on the stand, that the captain was foolish to think of such a thing. I think I had better develop that on cross-examination, however.

The Court: Being a "land-lubber," I am glad to hear him say that. It supports my question.



(Testimony of Carl Holm.)

Q. (By Mr. Collins): Assuming that the facts are as we have them, as they have been given to you, that the sampan is where it has been located, in your opinion would the safety of the tug be endangered if she continued to tow such a sampan?

A. There again I would have to answer that that I don't know, because even though there is a reserve buoyancy factor when the ship is submerged, there is still the danger of the master of the tug guessing wrongly as to that fact being a constant. In other words, although the sampan might have been deck to and staying in that condition for quite some time, there is still the danger of a deck letting go and the weight becoming [297] too much for the tug's stability. It is hard for me to answer that question, not knowing the other factors involved; and perhaps only technical personnel in the tug master's position would be able to judge clearly as to whether or not it would be safe to tow that ship any further than he did. I can readily see the tug master's decision in cutting the ship adrift because of the fact that he was uncertain, perhaps, of his knowledge in that respect, and rather than risking his ship, he set the tow adrift and thereby made certain that his own tug would stay afloat. Does that answer it?

Mr. Collins: That is all, your Honor.

The Court: Would your answer be the same if you also knew that this was this tug captain's first salvage operation, and he had had no prior experience?

(Testimony of Carl Holm.)

The Witness: I think that his action is more so excusable, in view of the fact that he had no prior experience in salvage towing as such, and that his mind would perhaps be made up sooner in setting the tow adrift, knowing his inexperience, than it would otherwise.

The Court: Excusable or understandable?

The Witness: I would say understandable, your Honor.

The Court: I have another question I want to ask before I turn him over for cross-examination. This line between the tug and the tow, does our evidence show whether that [298] was a cable or a rope?

Mr. Collins: I believe it was a line.

The Court: Is that rope?

Mr. Collins: That is rope.

The Court: What is the method of cutting the line between the tow and the tug ordinarily? An axe?

The Witness: If time is an object, an axe is used. In fact, any tug going to sea for tows in this position has an axe available for that particular purpose at all times. If time is better, perhaps the line is dropped from the tow, or perhaps the tow is brought alongside and the bridle let go or removed from the tow.

The Court: What I am getting at is in relation to your other question, that the tug captain might have feared that the tow's sinking would have

(Testimony of Carl Holm.)

pulled his ship down also. Would it have been the exercise of sound judgment to have stood by with an axe to see if the thing was about to take a dive and thus become dangerous?

The Witness: Yes, your Honor, it would have been good judgment on the towing captain's part to have an axe ready, even though he didn't stand by with the axe in his hand, to at least have it ready.

The Court: But until that tow started taking a nose-dive down into the water—These may be silly questions—was there any danger to the towing vessel, danger of being pulled [299] down to the bottom of the ocean?

The Witness: The danger in that respect, your Honor, can occur within a few seconds, inasmuch as the wreck, or the tow, might be kept afloat by a tank or by simply the strength of a deck, where an air pocket, is in evidence, and the wash of the sea or the surge of the sea might completely change that condition in a very few seconds to the extent that the tow line falls over the side. If there is a line, manila line, which in general is used, of course an axe handy there would carry that in a moment.

The Court: That is what I am getting at.

The Witness: Whereas, if an axe is not handy, a knife may be too slow and the tug would roll over in a moment.

The Court: All right. Cross-examination.

(Testimony of Carl Holm.)

Cross-Examination

By Mr. Quinn:

Q. What type of towing rig have you had in mind in replying to these questions; side by side or front and back?

A. In general the tow is always handled astern, and alongside it would in general, with any kind of sea running or weather conditions, result in damage to both ships.

Q. The reason I asked that question, I was interested in the actions of the tow, perhaps overcoming the stability of the tug. I believed you indicated it would swing over to the side and pull over sideways, capsizing it, capsizing the tug. [300]

A. Yes. There again the tug is generally constructed with its towing bits as close to the pivoting center of the tug as possible. Any ship's pivoting center—or any one of general design, I should say—has its pivoting center about one third from the bow of the ship, and the towing bit can never be installed there, but it is installed as far forward on the towing deck as is practical by reason of substructure and other things aboard. The distance from that towing bit to the towing rack or the stern, to the extreme counter, is generally much greater than that distance from the towing bit to the side of the ship. Therefore, if any weight comes on it after the tug stops towing, that towline, in general, sags over the side because that distance is shorter and the weight coming on it, of course, would bring it around in that position. That at times is com-

(Testimony of Carl Holm.)

batted with what is called Norman pins, a pair of heavy pins on each quarter of the tug that keeps the towline in line over the counter. However, Norman pins are generally removed when a tow is handled at sea because it restricts the steering quality of the tug. In other words, he just as well be towing from the Norman pins if she gave hard rudder. So chances are he didn't have Norman pins or they weren't there; and for a very good reason they were not there. And I could readily see his point, perhaps, in fearing that the towline would sag from the counter over the side of the ship, thereby impairing the transverse stability of the tug. That has occurred. I have [301] not been present at any sinkings, but it is something that towing personnel first of all is instructed in, to see to that, that if a tow is sinking on them, that it is gotten rid of before it comes over the side of the ship, and particularly when a wire is involved because time is——

Q. Mr. Holm, if the tug was making way up to the time it cut the line, and if the hawser at all times was back directly crossing the stern, would you say that there was danger at that time and until something happened to that line or to the position of the tug? At that time would you say there was danger to the tug, bearing in mind there is a sampan back there all the time, which, if it doesn't have complete positive buoyancy, at least, on the assumption you gave, based on the characteristics you gave, has very little negative buoyancy?

(Testimony of Carl Holm.)

A. You have to have positive buoyancy or negative buoyancy. There is nothing in between.

Q. Can't it have a little negative buoyancy? Does it have to plummet it down if it sinks?

A. It can have a little negative buoyancy, but regardless of how little it is, it fast becomes a very dangerous thing. In other words, an object will not stay in between very long. It will either go down or come up.

Q. Can you answer my question before we go into that matter?

A. Yes, I will answer that that I would say that if [302] you had a Manila towline, if the tug is under way, there is little danger of a condition occurring so rapidly that it cannot be taken care of, if the towline was over the stern, over the counter the way it should be.

Q. Do you still have in mind the characteristics of this particular sampan?

A. I am not familiar with that particular sampan. I perhaps seen it, but I don't know.

Q. I mean the characteristics as given to you by Mr. Collins.

A. The length, breadth, and draft is all that is indicated on this paper.

Q. I think the type of engine is indicated.

A. Yes.

Q. Are you familiar with the normal equipment aboard the normal fishing sampan?

A. The normal installation of equipment, I would say.

(Testimony of Carl Holm.)

Q. Installations, yes.

A. Yes, I would say I am.

Q. Now, if—Well, one further preliminary question. Have you any idea how fast wood that goes in to make up a hull loses its buoyancy?

A. That would be very difficult—that would be a very difficult answer to give you.

Q. Make an assumption for the moment that it has never [303] been subject to dry rot and that it has been kept in good seaworthy condition; how long would it take to lose its buoyancy?

A. That depends on the particular wood involved, and it depends on whether or not the particular ship has been in the water all during those years of its existence. I have seen wood with negative buoyancy after many years. For instance, the keel of ships will gradually waterlog to where it has negative buoyancy, whereas the above-water structure and above-water hull generally keeps its positive buoyancy. I would say that it is a thing that could not be generalized.

Q. In your opinion, would you believe that, if there had been proper care, the wood in a hull would not lose its positive buoyancy in four years?

A. I would say that it will lose some of its positive buoyancy, and how much is a question.

Q. Would you say it would become negatively buoyant in four years, in your experience generally?

A. I would say that none of it would become negatively buoyant in four years unless it is monkey-

(Testimony of Carl Holm.)

pod and hard wood that is already negatively buoyant. But I take it for granted that Oregon pine, for instance, is involved. Oregon pine will not become negatively buoyant in four years unless it is subjected to particular circumstances of pressure and weather. But monkeypod and all hard woods practically are negatively buoyant or very much so.

Q. Assuming that this sampan, which had no cargo, fuel tanks half full, and the other characteristics as given to you by Mr. Collins, assuming further that it had a crushed part three inches wide and a foot and a half long, but that that was pulling apart of the grain and opening of seams, rather than a hole, as expressively put by my brother, Mr. Collins, would you say that that sampan would sink?

A. I would say that from what I can see of the specifications of the ship, in regard to length and breadth and depth, and the weight factors in general involved in that type of sampan, that the buoyancy factor of the wood and the weight factor involved would lie very close together. It might be ten per cent in favor either way.

Q. But suppose it were 100 per cent negative, Mr. Holm—we get back to the question that I wanted to explore a moment ago—does that mean that the ship will thereupon plummet down, or does it mean that it would be a gradual process with plenty of time to cut a towline if it should do that?

A. That depends again on what the Court brought up a moment ago; if air pockets are in



evidence, such as they always are in a ship sinking, in tanks and underdeck spaces, and many other places, and they become submerged to the extent that they collapse, which is perhaps only at a depth of five or ten feet for every foot you put down, you have a half pound more pressure, and in general fuel tanks are not constructed to withstand any external pressure, perhaps they would stand a pound or so per square inch, when that ship is submerged five or ten feet, the weight factor becomes suddenly perhaps much greater by reason of those air pockets disappearing.

Q. Well, my question was directed to a time where this vessel remains 10 per cent negatively buoyant. I am not looking right now for the circumstance of sudden collapsing of an air bubble which would increase the negative buoyancy. If it were 10 per cent negatively buoyant all the way, would it plummet down, or would it be a gradual process? I am looking for characteristics of wood that is 10 per cent negatively buoyant for the moment.

A. Well, I would say that the per cent perhaps would amount to approximately two or three feet a second, or something like that, something of that sort. Of course it depends on the surfaces involved. If you throw a leaf in the water, there is a greater surface, and negatively buoyant at 10 per cent, it would take a long time to sink. If you throw a pin in the water, it would go rapidly down. In the case of a sampan, I would say it would amount to

(Testimony of Carl Holm.)

perhaps that much a second. I say 10 per cent because I have no way of judging accurately what it is without knowing the buoyancy factor left in the wood.

Q. You say these sampans are known to be pretty close buoyancy versus weight, one way or the other?

A. That you cannot generalize. Some of them are overpowered [306] and some of them are underpowered, and the weight of the engine is the greater factor in the weight of the ship.

Q. Is this one overpowered or underpowered?

A. I would say that she is powered with normally what those small deep-sea boats use.

Q. Not too much weight for its buoyancy?

A. Well, in installing an engine you would have considered that factor.

Q. Well, I would like to know your opinion of it, Mr. Holm.

A. What my opinion is as to whether or not that is too much weight?

Q. Too much weight for that buoyancy, whether it is or is not.

A. I have no way of judging that without knowing the buoyancy factor left in the wood.

Q. Assuming it were a new ship.

A. Assuming it is new?

Q. A new hull.

A. No question that it would stay afloat.

The Court: Question what?

(Testimony of Carl Holm.)

The Witness: No question that it would stay afloat.

The Court: Stay afloat?

The Witness: Yes.

Q. (By Mr. Quinn): Even though it were full of water up [307] to decks awash?

A. I assume this one has not been re-powered since this paper, 35 horse diesel, or something like that?

Q. That's right. In other words, if it were new and decks awash, of course it would stay afloat?

A. That's right.

Q. And you are not too much inclined to express your opinion about wood that is four years old without knowing the type of wood and the exact treatment it has had over those four years?

A. That would be a hard thing to do. It depends on the type of wood and the treatment that it has had.

Q. But you say generally wood, after four years of normal treatment, would lose some, but little——

A. That's right.

Q. (Continuing) ——positive buoyancy?

A. Yes, sir.

Q. Do you recall any cases of sampans sinking out here?

(Testimony of Carl Holm.)

A. I recall only one, of one of the pineapple company's tugs striking one, or a collision at sea, and I don't know what the circumstances were then.

Q. And did that sampan sink?

A. That I don't know. I don't know what the circumstances were or whether it sank, or what happened to it.

Q. Would you recall the name of the boat? [308]

A. Yes, I do. I believe it was brought into our dock and we fixed it up. She floated.

Q. She floated? A. Yes.

Q. And it was towed in from where?

A. That I don't know.

Q. Wasn't it the Molokai Channel?

A. That I don't know. I recall her laying alongside of our wharf and our men taking the body out from under it. They told me, before I got there.

Q. But that had a hole below the water line, didn't it?

A. She was very much damaged, yes.

Q. And was that a Hawaiian Pineapple tug that towed it to Hawaiian Tuna Packers?

A. That I don't know. She was secured there before I got there in the morning. I don't know who towed it in.

Q. Did you ever hear of a ship known as the Kasuga Maru? A. Kasuga Maru?

Q. Yes. A. I don't recall the name.

Q. So, do I understand that the only sampan you can recall sinking is the boat that was hit by

(Testimony of Carl Holm.)

the Hawaiian Pineapple barge and which was then towed in? [309]

A. Yes. Let's see, the small one that sank—the small one that had a fire while she was lying at the wharf, Kewalo Basin and I think we brought over to Hawaiian Tuna Packers.

Q. You pulled that over to Hawaiian Tuna Packers?

A. Yes. And I took the Marlin off the reef from Kauai, 75-foot sampan.

Q. Wooden? A. Wooden hull.

Q. Was she damaged below the water line?

A. Very much. She was high and dry when I got to her.

Q. Where did you tow her to?

A. We removed the engine from her, however, so that wouldn't have any bearing. The Islander was damaged beyond repair when she went on the reef at Maui. I flew over there to examine that for the underwriters. And the Alaska, the Government hull, when she submerged in a storm off of Hawaii.

Q. That was a sampan, the Alaska?

A. No, she was fishing craft.

Q. But, do you know this sampan, which I believe was over at Tuna Packers not long ago, called the Helena or Helene? A. Yes.

Q. There is prior testimony in this case that the Helene or Helana—I forget the name of it—is virtually a sister ship to the sampan involved in this case. Were you able to tell that by looking at the

(Testimony of Carl Holm.)

specifications, or does this create a [310] clear picture in your mind?

A. Well, when you consider that there are more than 100 sampans here, it is hard for a man to remember which is what, and my capacity as vice president puts me into many other things rather than the smaller jobs in the yard, which are routine. I will look at the Helene for my own interest in the case—or for my own interest, rather—but it doesn't strike a familiar sound at present. Was she submerged recently?

Q. Well, she sank sometime ago and then was towed in and rebuilt and is now still under the new name. It was the Kasuga Maru that I asked you about before.      A. Yes.

The Court: It sank and was towed in?

Mr. Quinn: It sank in the same sense as Mr. Holm used it a while ago, and was then towed in, yes, your Honor.

The Court: Before we go any further, as I understood Mr. Holm, he started to tell us of knowing of one sampan that did sink. Then I thought he corrected himself and talked about that same vessel being towed in with a hole in it. I am still not clear as to whether or not he is telling us of the fact that he does know of one sampan that did sink. If so, will you please clear that up.

The Witness: I don't know of any sampan that has been lost at sea through sinking, your Honor.

(Testimony of Carl Holm.)

The Court: Well, then, as I understand it, the sampan that you thought at first did sink was a sampan that was hit by a Hawaiian Pineapple barge; there were some lives lost in the collision.

The Witness: Yes.

The Court: Despite the injury to the sampan, which I take it was serious, it was towed successfully to Kewalo Basin from Molokai Channel?

The Witness: I don't know where she was towed from, your Honor. I came in there in the morning and found a vessel, sampan, alongside the wharf and read in the paper the same day that she had been struck by one of the pineapple tugs.

The Court: And you put two and two together?

The Witness: Yes.

Q. (By Mr. Quinn): You don't recall where that collision occurred between the Hawaiian Pineapple barge——

A. No, I don't recall.

Q. Well, Mr. Holm, taking a sampan of the characteristics of the Tenyo Maru, as disclosed by that bill that you have, and assuming that the sampan had had a major overhaul in 1944, and from 1946 to the date that it was abandoned, it was in dry dock not less than once every five months, and that at the time it was in dry dock anything that looked like it needed repairing was repaired, would you say that the master of the Kolo exercised good judgment in cutting the towline, which was at that time astern and the tow was making headway and the tug [312] was making headway at the time that the

(Testimony of Carl Holm.)

sampan was first noticed to be deck awash with four feet of freeboard forward and the neckhouse above water?

A. I believe, as I said, unless I knew the other factors involved, if any, such as sea and wind conditions——

Q. Well, the sea conditions normal for the channel, wind conditions a little bit brisker than normal, the tug master's first tow in the open sea. I believe you can postulate also that those are the only factors which he has told us he knew.

A. I believe the lack of knowledge on the part of the tug captain, lack of experience, had more bearing on his decision than any other factor involved, as you state them, and perhaps that very factor that made him decide to let go of the tow, not knowing exactly what the conditions would be if the weight came over the towline on the side.

Q. If you had been faced with those same conditions, being an experienced tow and salvage man with considerable training, if you were faced with those conditions and you saw that your tow was decks awash and you knew that it was a sampan without cargo—let's put it that way, that is all you knew—would you have ordered the towline cut at that moment?      A. With the experience——

Q. With your experience.

A. With my experience, I would have carried on for quite a while. I would have towed until I was absolutely sure [313] that she would submerge.



(Testimony of Carl Holm.)

However, as I say, his inexperience and lack of knowledge of stability factor and buoyancy factors involved, I can hardly blame him for his action. If I was in his boss' shoes—a small tug requires a small master, perhaps, and he couldn't expect to have a salvage expert at the wheel of a 60, 70-foot tug.

Q. You would expect a man to be competent to take care of those things he had in tow, though, would you not?

A. Well, that again depends on many factors. In the Navy, yes.

Q. Yes.

A. In commercial towing, why sometimes very hard to get experts at the price involved in towing sampans and other things.

Mr. Quinn: I have no further questions.

The Court: Redirect examination.

### Redirect Examination

By Mr. Collins:

Q. Mr. Holm, do you consider yourself as more experienced than the normal run of tow masters?

A. More experienced than normal?

Q. Yes. A. In tow masters?

Q. Yes. A. I believe that, yes. [314]

Q. Would you say that the tow master, under the circumstances that have been given to you, without knowledge of when the ship had last been docked, or of any other conditions outside of what

(Testimony of Carl Holm.)

was available to him by a surface inspection, that he exercised bad judgment in cutting the tow at that time?

A. I would say that if I was in possession of the same amount of experience and same lack of experience, perhaps as he, I would have acted in the same manner.

Q. Would you say that, if he had had an average amount of experience, cutting the tow, under those circumstances, would be bad judgment?

A. Well, that answer would depend on many factors. I don't think it is quite a fair question because I am not sitting here and judging the factors involved. There may have been other factors involved, or rather in addition to those, that might have a bearing on a decision in that case. For instance, the power of the tug, how long it will take him to make port, and weather reports, and condition of his own tug to carry on under such conditions; there are so many things involved in making a decision like that that it would hardly be fair to he or I to judge it from the witness stand.

Mr. Collins: No further questions.

Mr. Quinn: I have no further questions.

The Court: Thank you very much. You are excused.

(Witness excused.) [315]

The Court: You are through?

Mr. Collins: Yes, sir.

The Court: Mr. Quinn, do you still wish to avail yourself of the wide open opportunity to put on additional testimony in this line?

Mr. Quinn: It is a wide open opportunity presented, your Honor, but I think that the experts are enough in agreement that I don't care to put on any more, your Honor, unless your Honor would care, now that it is open, to hear more evidence, in which case I would be happy to produce it.

The Court: Very well. I do not desire any more, but I am very glad that I did reopen because I think the Captain has given us the best insight into this problem that we have had. He certainly is an expert in his field, whereas the other man may be an expert, but I don't think he is quite as much of an expert as this man is.

Mr. Quinn: He was only a lieutenant commander, your Honor.

The Court: Well, I think I might as well decide this case now as later. I have already made tentative findings of fact and conclusions of law indicated, and I have perused your memos and reflected on the matter for some time. I am going to subscribe to the in rem theory and to confirm the tentative findings of fact which I have previously made.

I conclude, therefore, that, being in lawful possession of [316] the Tug Kolo, the tug itself, which is the thing here sued in admiralty, is liable for the torts which it was made to commit by its captain, or perhaps more accurately stated in the language of the admiralty cases, the vessel itself committed

the torts. The question essentially is one of liability. I am satisfied that at the time the Tug Kolo undertook to tow the injured sampan from Kaunakakai to Honolulu the negligence on both sides of the picture at that time can well be said to have been equal, for both the tug captain and the sampan owner had an equal opportunity to know, and should have known, each of them, that there were risks involved.

But, coming to the point where we find this tug and its tow in the channel, under conditions that have been here explained and elaborated during the questioning of the witness this afternoon, we find that we have a small-sized tug, operated by a captain who has had no prior experience in salvage, who has at his right hand an able-bodied seaman, as you might call him, a Filipino man who has had considerable experience, who told us—the tug captain told us that—which I can hardly believe—from the time he last looked at the tow, in broad daylight, in Molokai Channel, from that time to the time he walked the length of his tug and back again the tow had become awash. I say I can hardly believe that it became awash that quickly, but even though I can hardly believe it, I believe he might have seen it becoming awash if he had paid proper attention to it. I [317] am not sure that that situation has any bearing on the ultimate decision which I will make, but I comment on that in passing.

That is the situation from the standpoint of the tug, whereas as to the tow we have a broad daylight situation, a vessel of the type described in Exhibit

1, and as you gentlemen have outlined the conditions in your hypothetical questions this afternoon—perhaps I had better recite them; namely, a sampan of the type described in Exhibit 1, with no cargo but the usual fishing tackle; one gas tank full and one half full, or part full; and a crew of three, I believe, aboard, the captain of the sampan being not licensed for this trip, but an experienced captain of a sampan nevertheless; with a gasoline motor aboard to do some pumping, which, by the action of the wind and the waves, became useless; the vessel being one that was overhauled completely in 1944 and periodically thereafter kept in good condition, but at the time had suffered an injury by being on a reef, in that it had a crushed section in the underneath part of its hull under its tanks; and the water conditions in the channel being normal, which is rough; and the wind being a bit brisker than usual; that is the situation that we find; that the towing equipment consisted of a hemp rope connecting the tug and the tow, and that the towline at all times in question remained over the stern of the tug.

Right there, at that point, even though up until then [318] both the owner of the sampan and the captain of the tug were, in my opinion, each equally negligent, at the point, under those conditions, when the tug captain observed the sampan for the first time to be awash with but four feet of the bow showing and a portion of the deckhouse showing, the sampan's crew sitting atop it, inviting the tug

to come take them off, I am satisfied that by lack of his experience the tug captain was negligent in cutting too quickly the towline; and, under similar circumstances, an experienced person would not have been as quick to have cut that towline, and it would have been possible, in the light of the experience with sampans that has been had here and to which the captain testified, Mr. Holm, in view of the condition of this particular sampan, despite its injury, for an experienced tug operator to have successfully towed that sampan to Honolulu, because I feel that he was understandably, but not excusably, negligent in being too fast in cutting that towline and sailing away and leaving that sampan adrift and awash. And I find that the tug is liable wholly for this maritime tort.

Now, you may submit findings of fact and conclusions of law consistent with this opinion, conforming as to form, and I will sign them.

Mr. Collins: May we have an exception.

The Court: You may, and I think there is some provision in admiralty where you have to write up exceptions and [319] get them allowed, and I shall be happy to approve them when they, too, are in proper form.

All right.

(Thereupon, at 3:05 p.m., May 23, 1949, the hearing in the above entitled matter was adjourned.)

I, Lucille Hallam, Official Reporter, United States District Court for the Territory of Hawaii, do hereby certify that the foregoing is a true and correct transcript of my shorthand notes in Admiralty No. 409, John Cho, Libellant, vs. The Tug "Kolo," her boats, engines, machinery, tackle, etc., Respondent.

July 11, 1949.

/s/ LUCILLE HALLAM.

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[Endorsed]: No. 12363. United States Court of Appeals for the Ninth Circuit. Young Brothers, Limited, Claimant of the Tug "Kolo" her boats, engines, machinery, tackle, etc., Appellant, vs. John Cho, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Territory of Hawaii.

Filed September 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12363

YOUNG BROTHERS, LIMITED, Claimant of  
the Tug "Kolo," her boats, engines, machinery,  
tackle, etc.,

Appellant,

vs.

JOHN CHO,

Appellee.

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANT ON APPEAL

Comes now Claimant Appellant, Young Brothers, Limited, and in conformance with Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, and hereby states that it is intended that the Appellant shall rely upon the following points:

(1) That the Tug Kalo is not liable in rem for the loss of the Sampan Tenyo Maru under the facts as they appear in the record;

(2) That the master of the Tug Kolo was not negligent in cutting the tow line on the Sampan Tenyo Maru, but in so doing exercised his best judgment to save the tug and the lives of those aboard the same; that if any fault attaches to the master of the tug for so doing, such fault is legally excusable under the circumstances of the case;



(3) That the cutting of the tow line was not the sole cause of the loss of the sampan, but that said loss was caused by her unseaworthy condition, which was known to the Libellant at the time the tow was undertaken;

(4) That for the reasons stated in the Assignments of Error filed herewith, the District Court erred in awarding the Appellee the decree in the sum of Eight Thousand Dollars (\$8,000.00) with interest and costs.

Dated: Honolulu, T. H., this 28th day of September, 1949.

SMITH, WILD, BEEBE  
& CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Oct. 3, 1949.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE RECORD  
TO BE PRINTED

Comes now Claimant Appellant, Young Brothers, Limited, and by and through its proctors, Smith, Wild, Beebe & Cades, does hereby designate the following portions of the record to be printed:

1. Libel, Interrogatories and Monition;
2. Stipulation of Libellant's Costs;
3. Claim of Owner, Young Brothers, Limited, and Release Bond of Claimant Owner;

4. Answer;
5. Answer to Interrogatories;
6. Transcript;
7. Libellant's Exhibit No. 1;
8. Bill of Costs and Affidavit;
9. Findings of Fact and Conclusions of Law;
10. Decree;
11. Notice of Appeal and Order;
12. Bond for Costs on Appeal;
13. Order Extending Time for Filing of Record on Appeal and Docketing of Appeal;
14. Assignments of Error;
15. Citation;
16. Appellant's Designation of Apostles on Appeal and Praeceptum Therefor;
17. Certificate of Clerk.

Dated: Honolulu, T. H., this 16th day of September, 1949.

SMITH, WILD, BEEBE  
& CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

To: Robertson, Castle & Anthony, Proctors for Appellee.

To: Clerk, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Sept. 22, 1949.

No. 12,363

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

YOUNG BROTHERS, LIMITED, Claimant  
of the Tug "Kolo", her boats, en-  
gines, machinery, tackle, etc.,

*Appellant,*

VS.

JOHN CHO,

*Appellee.*

Appeal from the United States District Court,  
Territory of Hawaii.

**BRIEF FOR APPELLANT.**

---

SMITH, WILD, BEEBE & CADES,  
Bishop Trust Building, Honolulu, T. H.,  
(J. EDWARD COLLINS),  
*Proctors for Appellant.*

JAN 13 1950

PAUL P. GIESSEN,



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No. 12,363

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

YOUNG BROTHERS, LIMITED, Claimant  
of the Tug "Kolo", her boats, en-  
gines, machinery, tackle, etc.,

*Appellant,*

vs.

JOHN CHO,

*Appellee.*

Appeal from the United States District Court,  
Territory of Hawaii.

**BRIEF FOR APPELLANT.**

---

**STATEMENT AS TO JURISDICTION.**

This case involves a libel filed in Admiralty in the United States District Court for the Territory of Hawaii against the tug "Kolo", her boats, engines, machinery, tackle, etc., a vessel located in the waters of the Hawaiian Islands and within the jurisdiction of the District Court. The action was to recover for the loss of the sampan "Tenyo Maru", owned by the libelant, which loss occurred while the said sampan was being taken under tow by the tug "Kolo" between

the islands of Molokai and Oahu, Territory of Hawaii (R. 2-9). A decree was entered by the District Court against the tug on June 3, 1949 (R. 28-29). On June 18, 1949, a Notice of Appeal was given (R. 29), and this Appeal has been perfected in compliance with Section 2107 of Title 28, United States Code.

This case involves matters in Admiralty within the jurisdiction of the District Court of the Territory of Hawaii (Title 28, United States Code, Section 1333). This Court has jurisdiction of an appeal from the final decision of said District Court for the Territory of Hawaii under Title 28, United States Code, Sections 1291 and 1294.

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#### **STATEMENT OF THE CASE.**

The appellant, Young Brothers, Limited, claimant and sole owner of the tug "Kolo", her boats, engines, machinery, tackle, etc., is, and at all relevant times has been, a Hawaiian corporation engaged in the tugboat business in the waters about the Hawaiian Islands.

The appellee, John Cho, is, and at all relevant times has been, a citizen of the United States, resident of Honolulu, Territory of Hawaii, and the owner of the sampan "Tenyo Maru". The sampan prior to its loss was used by the appellee in the business of commercial fishing (R. 74-75).

The Vice President of the claimant, whose principal office is located at Honolulu, Territory of Hawaii,

being informed on Sunday, April 3, 1948, that the libelant's sampan, the "Tenyo Maru", had grounded on a reef on the harbor of Kaunakakai, Island of Molokai, on the previous day, and assistance having been requested by the owner of the claimant, the claimant's tug "Kolo" was dispatched the following day, Monday, April 4, 1948, to the Island of Molokai to assist another tug of the claimant, the "Mahoe", in handling a pineapple barge at the Port of Kolo, Molokai, and also to look over the situation at Kaunakakai, and if possible without damaging the tug to tow the sampan off the reef and beach or dock her (R. 76, 216-217). There was no discussion on Sunday between the appellee and the claimant's officers concerning towage to Honolulu (R. 87, 204-205, 214-217).

On arriving at Kaunakakai on Monday, the tug-master of the "Kolo" found the tidal conditions were not favorable to operations on that day (R. 132). The following morning, the tug "Kolo" and the claimant's tug "Mahoe", the latter a larger vessel (the "Mahoe" being a 125-foot tug, 750 horsepower, crew of thirteen, the "Kolo" a 65-foot vessel, 250 horsepower, crew of three (R. 233)), arrived at Kaunakakai, and the captain of the "Mahoe", being the senior boat captain in the Port, took charge of the operation of removing the sampan from the reef (R. 132-134, 230). A discussion was had between the captain of the "Mahoe" and the appellee, during the course of which it was revealed that the sampan carried no insurance. The appellee, asking the cost of towage from the reef, the master of the "Mahoe" advised him to call the ap-

pellant's office in Honolulu. Two telephone calls were necessary to get the desired information (R. 226-229, 253-254). A tentative figure was given for the removal of the sampan, but no agreement was reached, it being stated by the appellant's General Manager that when the vessel was taken off the reef, a settlement could be arranged (R. 217, 254).

That afternoon, with the use of both tugs, the sampan was freed from the reef and brought in and tied up to the pier at Kaunakakai (R. 120). She had three to five feet of water in her when she was docked, and a gasoline pump worked, at least intermittently, during the night to keep her afloat (R. 59-61, 80). In addition a bridle was run under her from the pier to the "Kolo", which was tied outboard of her. The bridle was a precaution against the sampan sinking during the night (R. 136).

An inspection of the sampan revealed damage to her hull below the water line in the form of a tear or rip about a foot and a half long and approximately three inches wide, which had the appearance of a plank having been torn out (R. 61). The hull being in the water and water being inside her, she could not be closely examined for any further damage, and no soundings of the entire sampan were apparently made (R. 62, 121). Attempts at patching the hole, both from the inside and the outside, proved unsuccessful because of the location of the tear and the weight of the vessel (R. 54-55, 78, 108). The rudder and propeller were also found to be damaged (R. 232-233).

After the sampan was tied up at the pier that afternoon, a discussion was had between the tug master of the "Mahoe" and the appellee in which the latter made inquiry concerning towage to Honolulu. In answer, the appellee was advised that authorization for such a tow would have to come from the appellant's office in Honolulu (R. 233). The "Mahoe" left the Port shortly after this discussion (R. 243).

On the following morning the appellee and the master of the "Kolo", having received no additional instructions or authorization from the claimant's Honolulu office regarding the tow to Honolulu, the master of the "Kolo" undertook to tow the disabled sampan from the Port of Kaunakakai to the Port of Honolulu, a distance of some thirty sea miles (R. 108, 127-128). No repairs had been effected on the bottom at the time of the commencement of the tow, beyond the fact that a thirty-five gallon drum was lashed to the port side of the stern (R. 81).

The sampan's crew of three members was left aboard to man the pumps, which consisted of a gasoline and a hand pump (R. 66). When some fifteen miles from Kaunakakai, in the channel between the Island of Molokai and Oahu, more water was taken into the sampan than the pumps were able to handle, and in a period of approximately one-half an hour the sampan lowered in the water to a point where her decks were awash and only her cabin and bow projected above the water (R. 56-57, 66-69, 123-125, 142-145). At this point, the master of the "Kolo" cut the tow line, circled

about and picked up the crew members who had jumped over the side, and left for the Port of Honolulu.

According to the master of the sampan, the vessel was taking in more water than the pumps could handle prior to the gasoline pump being put out of operation by the spray. No signal was given to the tug, however, until half an hour after the gasoline pump died (R. 66-69). According to the master of the tug, periodic signals were given that everything was all right. The sampan rapidly submerged, however, before any distress signal was given, and then the only signal was from the crew that the tug go back and pick them up (R. 143).

At this time, according to the tug master, the entire main deck was awash, part of the cabin was submerged, and the bow was projected out of the water about four feet (R. 143-145). The waves in the channel were four to five feet high (R. 126).

The sampan had been built in 1921, and acquired by the appellee in 1946 (R. 184-185). She had been given a major repair job in 1945, which included among other things repairs to the sides and bottom. She was thereafter put in the yard for such minor repairs as might have been required on an average of every three to five months (R. 173, 184-185). Evidence was introduced to show that while sampans have been reported to have sunk (R. 201), such an occurrence was rare because of the peculiar construction of this type of vessel (R. 198). While expert testimony was received

that a sampan in the condition of the "Tenyo Maru" at the time that the tow line was cut would not normally sink, it could possibly have done so, and the seaworthiness of the vessel could be determined only after an inspection (R. 198, 200). Likewise expert testimony was received establishing that any determination as to whether a wooden vessel of this type would sink would depend upon the buoyancy of the wood in her, which in turn could be determined only by lengthy tests, and that a ship in the condition of this sampan might have had a buoyancy so low that the vessel would sink (R. 312, 322-327).

The value of the sampan prior to her grounding was estimated to be at \$8,000.00 to \$9,000.00. It was likewise testified that a hull repair job necessitated by the grounding on the reef would cost approximately \$650.00. This estimate was based upon merely the repair of the fractured skin on a break of about one and a half feet by three inches. It did not include, and no estimate was given, as to the repair cost for replacing fractured ribs or plankings, or for the costs of engine repairs as the result of inundation or for rudder, propeller and shaft repairs or replacement (R. 191-197, 199-200).

On these facts, the Court found the tug "Kolo" solely liable for the loss of the sampan, in that the tug master cut the towline and left the sampan adrift in a condition where it could have been towed into port. On the basis of these findings, the Court awarded damages in the sum of \$8,000.00, together with interest and costs, or a total sum of \$8,609.12, against the tug

“Kolo”. From this decree this appeal is taken (R. 29, 35).

---

### QUESTIONS OF LAW INVOLVED.

1. Can a libel *in rem* be maintained against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug, the tug master lacking the authority of the owner so to enter into the agreement, the circumstances being such that the libelant, owner of the tug, knew, or should have known, of the master's lack of authority?

2. Does the cutting of a tow line by a tug master constitute negligence as a matter of law where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where the question as to whether it will sink depends upon the amount of negative buoyancy in its wood structure, and where the safety of the tug would be jeopardized by the sudden foundering of the tow?

3. Assuming, without admitting, that the answers to the previous questions are in the affirmative, is the loss of the tow the sole responsibility of the tug, where the unseaworthy condition of the tow was known both to the owner of the tow and to the tug master, the tow was inadequately equipped for the voyage, the tow gave no adequate warning to the tug that it was flooding, and the apparent foundering of the tow was due to its unseaworthy condition, and no affirmative steps were taken by the master of the tow to prevent her abandonment?



**SPECIFICATION OF ERRORS RELIED ON.**

1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949 (R. 35);

2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949 (R. 35);

3. That the District Court erred in holding and deciding that the tug "Kolo" was liable *in rem* for the loss of the sampan "Tenyo Maru" under the facts of the case (R. 35);

4. That the District Court erred in not holding and deciding that the Master of the tug "Kolo", being without authority to take the tow of the sampan "Tenyo Maru" and such lack of authority being known to the libelant-appellee, owner of the Sampan "Tenyo Maru", or such knowledge being imputable to him, the Tug "Kolo" is not liable for the loss of the Sampan occurring in the course of the unauthorized tow (R. 35).

5. That the District Court erred in holding and deciding that the Tug "Kolo" was solely liable for the full damage suffered by the libelant (R. 35).

6. That the District Court erred in holding and deciding that the Master of the Tug "Kolo" was negligent in cutting the towline on the Sampan "Tenyo Maru" and that said negligence was the sole cause of the loss of the sampan (R. 35-36).

7. That the District Court erred in holding there was no necessity for cutting the tow loose under the

circumstances and that in so doing the Master of the tug "Kolo" failed to exercise the degree of care and skill required of a tug master in open sea towage (R. 36).

8. That the District Court erred in not holding and deciding that the Master of the tug "Kolo" acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the tug "Kolo" and to save the tug "Kolo" itself; that the sampan "Tenyo Maru", being awash, could not be towed to safety; and that the course pursued by the Master of the tug "Kolo" was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case (R. 36).

9. That the District Court erred in not holding and deciding that the Master of the tug "Kolo" used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the sampan "Tenyo Maru" and if the course he followed to save his vessel and crew was erroneous, such course was legally excusable under the circumstances existing in the case (R. 36-37).

10. That the District Court erred in not holding and deciding that the loss of the sampan "Tenyo Maru" was caused by her unseaworthy condition,

which condition was known to the libelant-appellee at the time that the tow of the sampan "Tenyo Maru" was undertaken (R. 37).

11. That the District Court erred in not holding and deciding that the sampan "Tenyo Maru" could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel (R. 37).

12. That the District Court erred in not holding and deciding that no damages should be awarded against the tug "Kolo" for the loss of the sampan "Tenyo Maru" in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him (R. 37).

13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of \$8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the sampan "Tenyo Maru" was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the tug "Kolo" for tow to Honolulu, which unseaworthy condition was known to the libelant and that at least one-half of the total damage resulting from the loss of the sampan "Tenyo Maru" should be awarded against the libelant-appellee (R. 37-38).

**SUMMARY OF ARGUMENT.**

1. A libel *in rem* may not be maintained in Admiralty against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug without the authority of the owner of the tug, which lack of authority was known, or should have been known, by the libellant, owner of the tow.

2. The cutting of a tow line by a tug master does not constitute negligence as a matter of law, under circumstances where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where only its bow projects above the water, and where the question as to whether it will sink depends upon the amount of buoyancy in its wooden structure, the safety of the crewmen of the tow and the tug would be jeopardized by a sudden foundering of the tow, and where the nearest point of land is some eight to ten miles away.

3. A tug and her master are not solely responsible for the loss of an unseaworthy tow, known to be such by her owner at the time the tow is undertaken, and where the tow is inadequately equipped for the voyage and where her captain failed to notify the tug that she was taking water in excess of the capacity of her pumps until a breakdown of the pumps occurred, and where her captain after leaving the vessel took no affirmative steps thereafter to save her.

**ARGUMENT.**

1. A LIBEL IN REM MAY NOT BE MAINTAINED IN ADMIRALTY AGAINST A TUG ON A CAUSE OF ACTION SOUNDING IN TORT ARISING OUT OF A TOWAGE AGREEMENT ENTERED INTO BY THE MASTER OF THE TUG WITHOUT THE AUTHORITY OF THE OWNER OF THE TUG, WHICH LACK OF AUTHORITY WAS KNOWN, OR SHOULD HAVE BEEN KNOWN, BY THE LIBELANT, OWNER OF THE TOW.

The trial Court found as a conclusion of law that negligent towage is a maritime tort, rendering the offending vessel liable *in rem* so long as it is in the hands of a person having lawful possession (R. 27). The Court also made oral findings of fact that the claimant had not authorized the tow from Kaunakakai to Honolulu. These oral findings leave open the question whether the master of the tug had ostensible or apparent authority to take the tow. The trial judge, believed the answer to that question immaterial in an *in rem* proceeding against the vessel (R. 282-283).

The appellant has assigned as error the Court's ruling in this regard, assignments numbered 1 to 4 and 12. These assigned errors are as follows:

"1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949;

2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949;

3. That the District Court erred in holding and deciding that the Tug 'Kolo' was liable *in rem* for the loss of the Sampan 'Tenyo Maru' under the facts of the case;

4. That the District Court erred in not holding and deciding that the Master of the Tug 'Kolo', being without authority to take the tow of the Sampan 'Tenyo Maru' and such lack of authority being known to the libelant-appellee, owner of the Sampan 'Tenyo Maru', or such knowledge being imputable to him, the Tug 'Kolo' is not liable for the loss of the Sampan occurring in the course of the unauthorized tow."

"12. That the District Court erred in not holding and deciding that no damages should be awarded against the Tug 'Kolo' for the loss of the Sampan 'Tenyo Maru' in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him." (R. 35, 37.)

The evidence upon which the appellant bases his contention that the appellee knew, or should have known, that the master of the tug had no authority to take the tow to Honolulu is: First, in the initial discussion of the removal of the sampan from the reef to Kaunakakai, which discussion was held in the claimant's office in Honolulu, the decision to lend assistance was made, not by the tug master, who according to the appellee was present at the conference (R. 76), but by the vice president and general manager of the appellant, who was contacted by telephone. Secondly, when the appellee in the port of Kaunakakai inquired of the master of the "Mahoe", the senior tug which was in charge of the salvage job on

the reef, concerning the cost of the removal, the master of the "Mahoe" told the appellee that the Honolulu office would give him that information (R. 227). Two telephone calls were had before any definite answer was received, and then only after contact was made with the general manager of the appellant (R. 228-230, 253-254, 217). Thirdly, after the sampan was docked at Kaunakakai, the senior tug master told the appellee that if towage to Honolulu were desired, he should call the Honolulu office (R. 244). The facts therefore on analysis clearly show that the appellee knew, or as a reasonable man should have known, that the tug master of the appellant had no authority to enter into towage contracts, to quote binding prices, etc., but that such contracts could be made only through the Honolulu office.

The reason the Court did not make this final determination, which is clear from the record, is that such determination was not necessary to the Court's theory of the case.

The legal problem presented herein is not a novel one in American jurisprudence, it having come before the Courts in startlingly analogous cases on three different occasions.

The first case is that of "*R. F. Cahill*" (D.C.S.D. N.Y.) 1878, Federal Cases No. 11,735, 9 Ben. 352. The original contract of towage in this case called for the tow of libellant's canal boat from New York to South Amboy and back. A limit line had been placed by the owner of the tug upon her and her

master, at 51st Street, New York City. On the return voyage, the owner of the tow asked the tug master to take the boat up to 57th Street, for which extra towage the owner promised to pay the tug master, said payment and deviation to be concealed from the tug owner. Between 51st and 57th Streets, the canal boat was struck and damaged by floating ice and sank in the river. A libel was brought against the tug for the loss. The Court denied relief, because the tug master had no authority to enter into this additional agreement, and such lack of authority was known to the owner of the tow.

The second case is that of the "*Andrew J. White*", (D.C.E.D.N.Y.) 1901, 108 Fed. 685. The barkentine "*Minnie*" was tied up in a slip in Brooklyn, along with other vessels. The location was such that immediately behind her and between her and the fairway of the river were tow barks. On the other side of the slip a steamer was secured with a scow tied up along the beam of the steamer. The removal of the "*Minnie*" from the slip required operations in very close quarters and the exercise of special skill. As the Court states, "The passage was possible under very nice adjustments, if duly executed pursuant to careful precautions." The towage contract was made by the "*Minnie*" with the agent of the owner of the tug, the agreement being that the captain of the barkentine would have her hauled down to the mouth of the slip ready for the tug. At the appointed time, however, it was found that the "*Minnie*" had not been moved, whereupon the tug master undertook to tow



her from her then position out of the slip. In the process, the "Minnie" was damaged by collision with the scow. A libel brought against the tug was unsuccessful, the reasons assigned by the Court being as follows:

"\* \* \* Hence, the service on the part of the tug was not only gratuitous, but, to the knowledge of the parties immediately participating, it was done against the will of the owner. Undoubtedly, the fact that the service was gratuitous would not preclude liability in case of sufficiently negligent execution of the work; but, where the master of a tug undertakes a service known to him and to the master of the tow to be wrongful as regards the owner of the tug, the doctrine that the act of the master is binding upon the vessel should not be applied. The master speaks authoritatively in the absence of the owner. In this case, the owner had withdrawn that authority by stipulating with the captain of the barkentine that it should not be exercised. Hence the master of the tug was acting as the servant or helper of the captain of the vessel, gratuitously doing a duty which the latter person had undertaken to do as regards the owner of the tug, and wrongfully using his employer's tug in this service. Of course, it is to be considered that the master of the tug might prefer to pull the tow out of the slip rather than to await the slow process of her own crew working her out, but that does not meet the vital objection that he was doing a thing which he had no right to do. He knew this. The captain of the barkentine knew it, and had agreed that it should not be

done. This court should not sustain the asserted rule that a captain of a vessel may make a specific contract for towage with the owner of a tug, which carefully excludes hauling from the slip on account of recognized danger, but the master of the tug, on arrival, may annul the provision for taking from the slip, and assume the risk thereof, which his employer has rejected, and which the captain of the tow assumed." (108 Fed. 685, 688.)

The third case is that of "*The Oceanica*" (1909), C.C.A. 2, 170 Fed. 893. Here a contract was made between the managers of the tow and the tug for towage to Buffalo, New York, the tow to assume all risks. The master of the tug, to oblige the owner of the tow, continued beyond Buffalo toward Tonawanda, New York. On the way down the Niagara River, beyond Buffalo, the tug broke its propeller and cut the tow line, which resulted in the tow being carried against a pier and becoming a total loss. The Court primarily concerns itself with the efficacy of a towage contract clause requiring tow to assume all risks. On rehearing, the Court states:

"\* \* \* If the master of the *Oceanica* to oblige the master of the barge towed the barge beyond Buffalo against his owners' orders, then neither the *Oceanica* nor her owners are liable because the owners of the barge knew that the contract was to tow simply to Buffalo."

(citing "*The R. F. Cahill*" and "*The Andrew J. White*".) (p. 897.)

These are the only three American cases that have been found dealing with the problem of a non-authorized tow (with the exception of "*The Madison*" v. *Wells* (1851), 14 Mo. 360, and *Bates v. "The Madison"* (1853), 18 Mo. 99, both of which cases were decided with reference to a Missouri statute), and it is submitted that the rule of these cases should be followed and the tug "Kolo" released of liability.

It has long been recognized by the Admiralty Courts in this country that as a general proposition a vessel should answer for the torts of its master and crew, irrespective of the fault of the vessel's owner.

In 1812 John Marshall, sitting in the Circuit Court, allowed a vessel to be forfeited for a false report filed by its master, despite the owner's protest that the master had acted without authority. Allowing the forfeiture, Marshall personified the vessel, attributing the offense to it. "*The Little Charles*", Fed. Cases No. 15,612.<sup>1</sup>

In 1834, Mr. Justice Ware, in "*The Phebe*" wrote a scholarly opinion on a shipper's right to a lien on a chartered vessel arising out of a contract made with the vessel's master, and found the vessel "bound in specie for the acts of the master" as a matter of maritime usage, 1 Ware 2nd Ed. 265, 270, subsequently followed in "*The China*", 74 U.S. 53, wherein the vessel was held liable, over the protests of the

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<sup>1</sup>It is to be observed that Marshall found the owner had authorized the master to make the report for the vessel, which report resulted in the forfeiture.

owner, for damages caused by the faults of a compulsory pilot.<sup>2</sup>

This doctrine has also been expressed and approved of by the Supreme Court in *United States v. "Brig Malek Adhel"*, 2 How. 210, 233, 234; *Ralli v. Troop*, 157 U.S. 386, 402, 403; "*The John G. Stevens*", 170 U.S. 133, 120; "*The Barnstable*", 181 U.S. 464, 467, and *Canadian Aviator Ltd., v. U. S.*, 324 U.S. 215, 224.

This animistic theory, which has not been accepted in England,<sup>3</sup> appears, according to Holmes,<sup>4</sup> to rest upon the primitive concept of deodand, and to others on the noxia dedetio principle of the Roman law,<sup>5</sup> either of which concept makes property liable for any loss occasioned by it, irrespective of the fault of the property's owner.

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<sup>2</sup>In England, which regards the in rem right against the ship as ancillary to the in personam right against the owner, Roseoc's Admiralty Practice, 5th Ed., Hutchinson, pp. 26-29, the owner is held personally responsible for the culpabilities of a compulsory pilot by statute, Pilotage Act 1913, 2 & 3, Geo. 5, C. 31, s. 15; in Canada, the pilots are considered agents of the owners and advisors of the masters, who retain control of the ship, 36 Victoria Can. C. 54, *Bell Telephone Co. v. "The Rapid"* (1897), Q.R. 12 S.C. 37; as they are under Dutch law, "*Prins Hendrick*" (1899), P. 177; French law, "*The Augusta* (1886), 6 A.A.P.M.C. 58, 161; the law of Belgium, "*The Dallington*" (1903), P. 77; the law on the Danube, "*The Agnes Otto*" (1887), 12 P.D. 56; and on the Suez, "*The Guy Mannering*" (1882), 7 P.D. 52, 132.

<sup>3</sup>It has been severely criticized in Marsden's *Collisions at Sea* (9th Ed. Gibb), p. 79, et seq.

<sup>4</sup>Primitive Notions in Modern Law, 10 A.L.R. 422, 432, et seq., *The Common Law*, 26-30.

<sup>5</sup>Judge Harrington Putnam, 17 A.L.R. 1, "*The Liability of Shipowners for Masters' Faults*".

That this theory cannot be absolutely applied in favor of a person injured, as against an offending vessel of an innocent owner, has been recognized. Thus, while in "*The Arturo*" this artificial doctrine of personification of the ship is logically followed to the conclusion that if pirates stole a ship, she would still, as an offending vessel, be liable for injuries to another, 6 Fed. 308, 313,<sup>6</sup> the Supreme Court in "*The Barnstable*" limited noxal liability to cases where the damage results from the operations of those lawfully in possession of the vessel, whether as owner or charterers, 181 U.S. 464, 467. While this limitation has not been otherwise spelled out judicially, it has received support. *Hughes on Admiralty*, 2nd Ed., p. 131.

In "*The Eugene F. Moran*", 212 U.S. 466, which involved a collision between a float under tow and a mud scow under another tow, it was urged that since a ship was liable *in rem* for the torts of a compulsory pilot according to "*The China*", a tow should be liable for the torts of the tug towing it, the liability or lack of liability of the owner of the tow being of no consequence. Holmes however refused to follow the principle of "*The China*", stating that while the doctrine of holding the ship personally responsible might make the vessel a wrongdoer, even though her owners are not culpable, the fiction surviving because of the convenient security thereby furnished, "\* \* \* a fiction is not a satisfactory ground for taking one man's prop-

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<sup>6</sup>Cited with approval in *U.S. v. Certain Sub-freights Due "S.S. Neponset"*, 300 Fed. 981, 990.

erty to satisfy another man's wrong, and it should not be extended." 212 U.S. 466, 474. The *in rem* theory was consequently limited to cases where the mismanagement was by those aboard the offending vessel.

The personification doctrine has been limited in other respects by the Courts as the circumstances of the cases have required. Thus in "*The Joseph Vaccaro*", 180 Fed. 272, the Federal District Court in Louisiana refused to permit a libel *in rem* to be brought by a pilots' association for damage incurred by the pilot boat as a result of a collision with a ship piloted by one of its members. In the *L.&W.B.C.Co. No. 11*, 53 Fed. Sup. 326, the District Court for the Eastern District of New York refused to entertain a libel *in rem* against a crane barge operated by a charterer for damage to the libelant's barge occurring in the unloading of stone blocks by the crane barge, which damage was due solely to the negligence of the employees of the charterer. Again the Second Circuit Court limited the doctrine of vessel personification in a case involving a collision between a convoy vessel and a nonconvoyed vessel. The ship of the convoy Commodore was impleaded on the theory of *in rem* liability for her master's failure to give proper instructions to the convoy. It was held the Commodore's fault was not imputable to his ship, *Publicover v. Alcoa Steamship Co.*, "*The Lillian E. Kerr-The Alcoa Pilot*", 168 Fed. (2d) 672.

The Supreme Court is also found to have refused to extend the doctrine in "*The Queen of the Pacific*", 180 U. S. 49, where a limiting provision for the presenta-

tion of claims set up in a bill of lading was held to run in favor of both the ship and the owner and to bar a suit filed against the ship, even though the contract was entered into with the owner. The Court found the claim to be against the owner although the suit was filed against the ship.

The creation of maritime liens against vessels through the unauthorized acts of the master or crewmen entering into maritime contracts for repairs, supplies, or necessities, has long been limited by statute in the United States. The Federal Maritime Lien Act of June 23, 1910 (36 Stat. 604), as amended by the Merchant Marine Act of June 5, 1920 (41 Stat. 1005, now contained in Title 46, U.S.C. Secs. 971-975) requires for a lien enforceable *in rem* against a ship that the services or supplies be furnished at the request of certain persons presumed to have authority to bind the ship and owner. No lien can arise, however, when the person furnishing the services knew, or by reasonable diligence could have ascertained, that the person ordering the services or supplies was without authority so to do. (Sec. 973 of Title 46).

This statute represents a limitation of the *in rem* theory of customary admiralty law, certainly as recognized in France, where it is presumed that necessities are furnished on the credit of the vessel, unless it be shown that the materialmen trusted the person and not the thing. The 2 *Emerigon, Traite de Assurances et des Contracts a la Grosse*, Bouloy, Paty Ed., Ch. XIII, Sec. 111, 3 *Kent's Commentaries* (13th Ed.), p. 168,

*The Young Mechanic*, 2 Curt. 404, Fed. Cases No. 18,180.

While the libel herein does not involve an action *ex contractu*, but is delictual in nature, the background of the case is contractual. In this respect it differs from collision cases where one person's vessel is involuntarily thrust into contact with another's. Here the libellant voluntarily entered into the relationship with the tug with a full knowledge of substantially all the pertinent facts. He chose to entrust his sampan to the master of the "Kolo", under circumstances where he knew, or should have known, of the lack of authority of that master to take the tow to Honolulu. It is submitted that the case should not be resolved by a mechanistic application of delictual principles in complete disregard of the admiralty principles applicable in contract situations.

The *in rem* theory of personification of a ship is at best an artificial doctrine. The fact that under certain circumstances it takes one person's property to satisfy the wrong of some other person rests not upon justice, but only upon pragmatic grounds.<sup>7</sup> Its application should not be extended beyond adjudicated cases. The only decisions in this country involving unauthorized

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<sup>7</sup>Holmes says it is supported by an appearance of common sense which accounts for its survival. The ship is the only security available in dealing with foreigners, and the ease with which a foreign ship can be seized and made to pay for the wrong in lieu of the necessity of the injured citizen being required to go into a foreign court to secure redress against the owner, is appealing. *The Common Law*, p. 28. Of course this situation does not prevail here, where the owner can be sued as easily as the ship.



tows have exonerated the tugs from liability. In England, neither tug nor owner would be liable under these circumstances. It is therefore submitted that this Court should not go beyond the American and English authorities, and blindly apply an artificial doctrine, where the result would not only be eminently unfair and unjust, but would also do violence to common sense.

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2. THE CUTTING OF A TOW LINE BY A TUG MASTER DOES NOT CONSTITUTE NEGLIGENCE AS A MATTER OF LAW, UNDER CIRCUMSTANCES WHERE THE TOWED VESSEL IS RAPIDLY SINKING, APPEARS TO BE ON THE VERGE OF COMPLETELY SUBMERGING, WHERE ONLY ITS BOW PROJECTS ABOVE THE WATER, AND WHERE THE QUESTION AS TO WHETHER IT WILL SINK DEPENDS UPON THE AMOUNT OF BUOYANCY IN ITS WOODEN STRUCTURE, THE SAFETY OF THE CREWMEN OF THE TOW AND THE TUG WOULD BE JEOPARDIZED BY A SUDDEN FOUNDERING OF THE TOW, AND WHERE THE NEAREST POINT OF LAND IS SOME EIGHT TO TEN MILES AWAY.

This point is directed to the following assignments of error:

“6. That the District Court erred in holding and deciding that the Master of the Tug ‘Kolo’ was negligent in cutting the towline on the Sampan ‘Tenyo Maru’ and that said negligence was the sole cause of the loss of the sampan.

“7. That the District Court erred in holding there was no necessity for cutting the tow loose under the circumstances and that in so doing the Master of the Tug ‘Kolo’ failed to exercise the degree of care and skill required of a tug master in open sea towage.

“8. That the District Court erred in not holding and deciding that the Master of the Tug ‘Kolo’ acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the Tug ‘Kolo’ and to save the Tug ‘Kolo’ itself; that the Sampan ‘Tenyo Maru’, being awash, could not be towed to safety; and that the course pursued by the Master of the Tug ‘Kolo’ was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case.

“9. That the District Court erred in not holding and deciding that the Master of the Tug ‘Kolo’ used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the Sampan ‘Tenyo Maru’ and if the course he followed to save his vessel and crew was erroneous, such course was legally excusable under the circumstances existing in the case.”

“11. That the District Court erred in not holding and deciding that the Sampan ‘Tenyo Maru’ could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel.”

(R. 35-37.)

The sampan was grounded on a reef sometime on Saturday, April 3rd, 1948, and was removed in the

afternoon of Tuesday, April 6th (R. 76, 120). During that time she was beating upon a boulder, causing the boat to rock as each wave came in (R. 77-78). On her being freed and taken into port, a superficial inspection revealed a hole in her hull about one and a half feet long and three inches wide (R. 61). A closer examination of the soundness of her hull could not be made either from the inside or outside (R. 80, 121). At the time the tow was undertaken, the hole had not been successfully patched and the bottom was not strengthened (R. 54, 112), although the water, which at the time of docking had half filled her, had been pumped out so that she was relatively dry.

In this condition the tow was undertaken to Honolulu, a distance of some thirty miles, through open unsheltered water. The sampan had as a crew her captain and two deck hands who remained aboard to man the gasoline and hand pumps (R. 66). When some fifteen miles from Kaunakakai and in the channel between the Islands, the gasoline and hand pumps were unable to keep up with the water. No signal was given to the tug until the gasoline pump stopped working, at which time the captain of the sampan did give a signal (R. 68). The testimony of the captain of the sampan is somewhat confused as to whether the line was then cut, or whether hand pumping was continued for another half hour after the gasoline pump stopped before the tug was signaled and the line cut (R. 56, 68). At the time of severing of the line, according to the captain of the tow, the water was about up to the gunwales of the sampan (R. 56).

According to the master of the tug (a witness for the libelant, he no longer being in the employ of the appellant (R. 222-223)), the tug and tow were in the middle of the Molokai channel when the tug master, shortly after observing the tow riding normally, saw her to be under water aft of the bow, with the cabin completely submerged or substantially awash, and the men clinging to the submerged cabin. About four feet of the bow at that time was above water. At that point, upon the men on the tow signalling him to pick them up, the captain of the tug cut the tow line, and the men on the sampan dove in the water and were picked up by the tug (R. 124-125, 144). The tug thereafter left the scene with only four feet of the sampan's bow visible above the water. The sampan was never again seen or reported.

While at the pier at Kaunakakai, an unsuccessful attempt was made to pump the water from the sampan by using the tug's pump (R. 82, 111).

The evidence shows that a deck hand on the tug, whose testimony was refused as an expert, told the captain that he should not cut the line as he thought the sampan would not sink but would float (R. 150), and also over objection testified that he thought the tug master was a "bit scared" when he severed the tow line (R. 154).

The libelant offered an expert who testified that while sampans do not normally sink, a possibility of sinking could not be ruled out, and one case was known where a sampan completely submerged (R. 200-201).

An expert of the appellant testified that to determine whether a sampan in the condition described could be safely towed to land some eight to ten miles away, bouyancy factors would have to be known, which could only be ascertained accurately by tests made on the wood itself, and that while a new sampan in the then swamped condition of the "Tenyo Maru" would stay afloat, in a vessel of the age and characteristics of this one, the weight and buoyancy factors would lie very close one to the other, so that it would be a close question whether she would sink (R. 311-320, 324-327).

It was in this condition that the master of the tug cut the tow line.

The fundamental admiralty law is that the relationship of a tug and tow is such that a tug is not a common carrier nor bailor. It is not an insurer against damage to its tow. The towing vessel and her master are required to exercise only reasonable care and maritime skill under the circumstances. The burden is upon the libelant to establish that there was a failure on the part of the tug or her master to exercise the required care or skill, and that such failure resulted in loss. *Stevens v. "The White City"*, 285 U.S. 195, *Standard Oil Co. v. Ship Owners & Merchants Tugboat Co.*, 17 Fed. (2d) 366.

It is well established that in an emergency, negligence on the part of the tug or her master does not follow from a mere error in judgment. This principle has been stated by the Third Circuit Court of Appeals in "*The S.S. Bellatrix*", 114 Fed. (2d) 1004, 1007:

“Even if the pilot had not acted thus competently, the question of negligence would still be resolved in the light of the circumstances. At no time would he be required to choose the best way out and, when faced with an emergency, negligence does not follow from mere errors in judgment.”

The Second Circuit Court has expressed the rule as follows:

“It is true that a tug and her owner, while required to exercise good seamanship, are not liable for mere errors of judgment in difficult situations and are not required to ‘do precisely what, after the event, others think may have been better.’ ”

*The Stirling Tompkins*, 56 Fed. (2d) 740.

Holding to much the same effect is *Eastern Transportation Co. v. “The Nancy-Moran”*, 78 F. Supp 646, wherein it is stated that there is a failure to exercise good judgment by the tug captain only if his conduct is outside the range of possible discretion and his error in judgment is gross and flagrant.

In order for the libelant to recover, there must be a showing of negligence on the part of the tug, that is, that the damage for which recovery is sought was caused by breach of duty imposed upon the towing vessel, *Stevens v. “The White City”*, 285 U.S. 195, and *New Orleans Coal & Bisso Towboat Co. v. The United States*, 86 F. (2d) 53, *certiorari* denied, 300 U.S. 676, and evidence consistent with the hypothesis that a towing vessel is negligent and that it is not negligent does not establish liability for damage to the tow, *Stevens*

*v. "The White City"*, *supra*. Consequently the foundering of a tow presents no presumption against the tug. "*The Benning*", 44 F. Supp. 645, and *Schuylkill Transportation Co. v. Banks*, C.C.A. 3, 152 F. (2d) 405.

Here the evidence shows that sampans do not generally, but do occasionally, sink. It shows that the sampan had been subjected to a pounding on the reef and that her bottom was visibly damaged. It shows that she sank rapidly from a relatively normal position to one where only four feet of her bow were above water. It shows the pump of the tug could not be used to pump out the sampan. It shows that the crewmen of the tow were precariously clinging to the submerged cabin at the time the line was cut. It shows that the submergence of the sampan with a line to the tug would endanger the tug if the line should not be directly astern of the tug, but should be on her quarter or beam. It shows that the ultimate question as to whether the tug would sink to a completely submerged position depends upon the buoyancy of the wood in her structure, something not ascertainable by mere observation. It shows the positive buoyancy factor of the tug, if existent, was slight. The evidence does not show, however, that the line having been cut to permit the tug to circle about to pick up the crew members from the hulk, it could have been with safety restored to the sampan and the tow resumed. It does not show that the sampan did in fact remain afloat for five minutes after the tug left her, or for five hours thereafter, or for any other length of time. It does show

that the master and crew of the sampan signalled to be taken off her and aboard the tug. It does not show that the master of the tow when taken aboard the tug protested either against the cutting of the line or the abandonment of his ship, although the master of the tow appeared as a witness. It does not show that the master of the sampan was of the opinion that his vessel could be towed to land. "*The Asher J. Hudson*", C.C.A. 2, 154 Fed. 354.

It is submitted that the finding of the Court below that the cutting of the line constituted negligence on the part of the master is, in the light of all of the facts and circumstances, a clearly erroneous finding, and this appeal in admiralty being a trial *de novo*, the trial Court's findings must be set aside as they are clearly contrary to the preponderance of the evidence, *Drain v. Shipowners and Merchants Towboat Co.*, 149 F. (2d) 845, C.C.A. 9.

It is submitted that it was the duty of the tug master to pick up the crew members of the tow, when their lives were in jeopardy because of the vessel sinking under them. It certainly cannot be stated that the tug master had no duty toward them or that any such obligation is to be subordinated to his responsibilities to a sinking vessel. It is submitted that his conduct in this respect was not negligent and that it did not even consist of an error of judgment.

Once the tow line had been cut, it appears clearly from the evidence that the tug was unable to render assistance to the tow, at least to the extent of lightening her in the water and preventing her further sink-



ing. Where such is the fact, it has been held that there is no negligence on the part of the tug in abandoning its tow. "*The Brilliant*", 64 F. Supp. 612.

In this case, in the absence of evidence that the tug, after the line had been cut and the men rescued, could have with safety put a tow line on the sampan, resumed the tow and brought her eight to ten miles to the nearest point of land, and in the absence of any evidence that if such conditions did exist that they were known or should have been known to an average tug master, it is submitted that as a matter of law there is no negligence on the part of the captain of the tug in abandoning the tow. There is no evidence to show that the tug master knew that the tow had been overhauled in 1946 and had been serviced in boat yards periodically thereafter. There is no evidence to show that he knew or should have known of the buoyancy of the wood in the vessel.

It is submitted that the fact that the tow might have been prematurely abandoned cannot be considered other than as an error of judgment on the part of the tug master, and that such error of judgment would not constitute negligence in the absence of a showing that the sampan did stay afloat for a time after abandonment sufficient to have permitted her being towed to shore. This showing has not been made.

Consequently the tug "Kolo" should not be held responsible for the loss of the sampan.

3. A TUG AND HER MASTER ARE NOT SOLELY RESPONSIBLE FOR THE LOSS OF AN UNSEAWORTHY TOW, KNOWN TO BE SUCH BY HER OWNER AT THE TIME THE TOW IS UNDERTAKEN, AND WHERE THE TOW IS INADEQUATELY EQUIPPED FOR THE VOYAGE AND WHERE HER CAPTAIN FAILED TO NOTIFY THE TUG THAT SHE WAS TAKING WATER IN EXCESS OF THE CAPACITY OF HER PUMPS UNTIL A BREAKDOWN OF THE PUMPS OCCURRED, AND WHERE HER CAPTAIN AFTER LEAVING THE VESSEL TOOK NO AFFIRMATIVE STEPS THEREAFTER TO SAVE HER.

This point in the argument is attributed to the following assignments of error:

“5. That the District Court erred in holding and deciding that the Tug ‘Kolo’ was solely liable for the full damage suffered by the libelant.”

“10. That the District Court erred in not holding and deciding that the loss of the Sampan ‘Tenyo Maru’ was caused by her unseaworthy condition, which condition was known to the libelant-appellee at the time that the tow of the Sampan ‘Tenyo Maru’ was undertaken.”

“13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of \$8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the Sampan ‘Tenyo Maru’ was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the Tug ‘Kolo’ for tow to Honolulu, which unseaworthy condition was known to the libelant and that at least one-half of the total damage resulting from the loss of the Sampan ‘Tenyo Maru’ should be awarded against the libelant-appellee.”

(R. 35, 37-38.)

It is clear from the evidence and found by the Trial Court that both the owner of the tow and the master of the tug were aware that the sampan was unseaworthy at the time the tow was undertaken (R. 26). The evidence also shows that due to this unseaworthy condition, the sampan took on more water than the pumps could handle, and that she lowered in the water until her decks were awash, her cabin partly inundated, and only three or four feet of her bow above water, at which time she was abandoned (R. 56-57, 66-69, 123-125, 142-145). The testimony of the master of the sampan shows that the gasoline pump, which was situated on the open deck, stopped working when the spray affected it, the pump being inadequately protected from the spray by a small piece of canvas (R. 72-73), that prior to the gasoline pump becoming inoperative, water was taken into the ship faster than the pump could handle it, that no signal was given to the tug of this condition until after the gasoline pump became inoperative and only the hand pump was being used (R. 68-69). Subsequently, when the crew signalled to the tug that they be removed from the tow (R. 143), the tug cut the line, proceeded back, and picked up the crewmen who had jumped into the sea, and thereafter left the scene. No testimony was elicited from the master of the tow indicating that he either protested the cutting of the line or abandonment of the tow, or took any further steps to save his vessel. From his silence it may be inferred that he felt that no assistance could be rendered the sampan and that she should be abandoned in her sinking condition.

In many cases where similar factors have existed, the Courts have found that the loss of a tow has been the responsibility of both the tug and the tow. Thus the fact that an unseaworthy vessel has been taken in tow, and its condition known to both the tug and the tow, its subsequent loss has been held the joint responsibility of both vessels, and damages have been halved. *Mason v. The Steam-Tug "William Murtaugh"*, 3 Fed. 404; *"The Bordentown"*, 16 Fed. 270; *"The Syracuse"*, 18 Fed. 828, and *Dady v. Bacon*, 133 Fed. 986. Under this well-established law of damages in admiralty, it would seem that the damages herein, if it is found that the master of the tug was negligent, should be halved, because the negligence of the owner of the tow brought about her loss.

In addition, however, the fact that no notice was given to the tug that the tow was taking water in larger amounts than the pumps could handle, is evidence of negligence on the part of the tow, and it has been recognized that this form of negligence is sufficient to cause the damages to be divided, where negligence of the tug also contributed to the loss.

As illustrative of this principle is the case of *"Coleraine"*-*"The Nellie Tracy"*, 179 Fed. 977, wherein it was found that the tugs were negligent in failing to keep a proper lookout, and the tow that was lost was likewise negligent in that her captain made no attempt to signal the tugs when the conditions of the wind and weather adversely affected the tow. As the Court states with regard to the fault of the tow:

“While no duty rested upon the other captains to perform any service with reference to the boat Virginia E., nevertheless these captains owed it to the tug, which was doing the towing, to warn it in time of any mishap to the tow; and their evident hesitation in disturbing the tug, and their participation in the idea which the captain of the Virginia E. seems to have had, that he had nothing to do except to wait until arrival at his destination, is more or less instructive in showing the relations existing between the crews of the tugs and the men upon the barges, and indicates that these barge captains should be shown that some responsibility rests upon them. The captain of the Virginia E. might not have been able to put all of the hatch covers across the large cockpit to his barge, and he might have been entirely unable to interpose any obstruction to the sweep of the waves along the deck; but, if that were the case, he should immediately have attempted to warn the tug. The evidence shows plainly that a long time elapsed, in which he not only did nothing, whether useful or otherwise, to keep the water out of his boat, but also did nothing in the way of attracting the attention of the tugs. Under such circumstances, the tugboats and the barge should be held responsible for the loss.” (179 Fed. 977, 978.)

The decision was affirmed by the Second Circuit in 185 Fed. 1006.

In “*The Robert H. Cook*”, 207 Fed. 626, it was found that both the tug and the tow were liable for the loss of the tow, the tug being negligent in setting a course such as it did, the condition of the weather

being what it was, and the tow was held negligent for failing to notify the master of the tug of her leaking condition. As the Court states:

“After the collision and increased leaking it was his duty (i.e., the master of the tow) at once to notify the captain of the tug of her *actual* condition, which, on his own evidence, he did not do, and to keep a constant all night watch, as they were going out into deeper and broader waters in a very dark night and with increasing wind which rocked or tumbled the boat and made a heavy sea. There is a grave suspicion that the master of ‘The Grube’ (the tow) did not care whether she sunk or swam, survived or perished, so long as he himself survived. At best he was lazily indifferent.” (Parentheses added.)

It is submitted that the failure of the master of the sampan to notify the captain of the tug as soon as the vessel took water in greater amounts than the pumps could handle, and the delay in signaling until such time that the vessel was “in extremis”, constituted negligence on the part of the sampan which contributed to its loss. On this ground alone the damages should be halved in the event that the tug should be held negligent in the loss of the tow.

In this case the facts are somewhat analogous to those found in “*The Delta*”, 125 Fed. 133, where a tug towed a stranded vessel, to which was lashed a scow pumping her, from a reef. Upon being freed, the suction pump burst, causing the damaged vessel to take in water in large amounts. Instructions were shouted to the tug to take her in fast because she

was sinking. The resultant increase in speed by the tug caused the scow to ship water and to sink. It was held that the tug was liable for proceeding at an excessive rate of speed, and the scow was equally at fault by participating in the hails which resulted in the increased speed. The fact that attempts were thereafter made to inform the tug to reduce her speed did not change the result of apportioned damages.

Also holding that there is an affirmative duty upon a tow to inform the tug of its conditions when its safety is endangered, the failure of which places liability upon the tow, is "*The Gypsum King*", 279 Fed. 297, and "*The Vale Royal*", 51 F. Supp. 412.

There is also a further duty recognized in Admiralty law upon a person whose vessel has been damaged to take affirmative steps thereafter to limit the damage, and a failure so to do will result in a limitation of recovery to the value of the vessel prior to the time when such steps should have been taken. This principle has been set out in the case of "*The Baltimore*" v. *Rowland*, 8 Wall. 377, a collision case involving the sinking of a vessel. It was brought out in the trial that the vessel could have been raised and floated by the owners, but they failed to do so. The Court held that the owners were negligent in that respect, and found that recovery could not be had for the full value of the vessel and the cargo. The Court states:

"Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were at fault,

but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but wilfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default." (8 Wall. 377, 387.)

It was contended by the libelant herein, and found by the Court below, that the cutting of the tow line was due to the inexperience of the tug master and his failure to appreciate the fact that a sampan in such circumstances might have been safely towed ashore. While the appellant does not agree with this conclusion, if for the sake of argument it should be admitted as true, then it is submitted that the affirmative duty rested upon the master of the sampan, who, having spent three years as captain of her, and presumably was well acquainted with the vessel, to protest to the master of the tug against the cutting of the line and of her abandonment. It was the duty of the captain of the sampan to explain to the inexperienced tug master what the buoyancy factors were such as would permit her safe towage to land. The record is silent as to any such protest on his part or as to his taking any affirmative action to save his vessel. It is submitted that either in his opinion the sampan could have been towed to port or in his opinion it could



not have been towed into port. If his opinion was actually the former, then there was an affirmative duty upon him to insist that the tow be resumed. The failure on the part of the libelant to prove that any steps were taken to save the vessel at that point should at least result in a halving of the damages. If it was the opinion of the master of the sampan that the vessel could not be safely towed to land, then it is submitted that there was no negligence on the part of the master of the tug in cutting the line and in abandoning the vessel. Under these circumstances, no liability should be imposed upon the tug.

It is therefore urged that, if the tug "Kolo" was negligent in cutting the tow line and abandoning the tow, there was negligence on the part of the tow which contributed to the loss, and consequently the tug is not solely responsible in damages but the damages should be halved.

---

### CONCLUSION.

It is, therefore, respectfully submitted that:

1. A libel *in rem* may not be maintained in Admiralty against a tug on a cause of action sounding in tort arising out of a towage agreement entered into by the master of the tug without the authority of the owner of the tug, which lack of authority was known, or should have been known, by the libelant, owner of the tow.
2. The cutting of a tow line by a tug master does not constitute negligence as a matter of law, under

circumstances where the towed vessel is rapidly sinking, appears to be on the verge of completely submerging, where only its bow projects above the water, and where the question as to whether it will sink depends upon the amount of buoyance in its wooden structure, the safety of the crewmen of the tow and the tug would be jeopardized by a sudden foundering of the tow, and where the nearest point of land is some eight to ten miles away.

3. A tug and her master are not solely responsible for the loss of an unseaworthy tow, known to be such by her owner at the time the tow is undertaken, and where the tow is inadequately equipped for the voyage and where her captain failed to notify the tug that she was taking water in excess of the capacity of her pumps until a breakdown of the pumps occurred, and where her captain after leaving the vessel took no affirmative steps thereafter to save her.

Dated, Honolulu, T. H., this 4th day of January, 1950.

SMITH, WILD, BEEBE & CADES,  
*Proctors for Appellant.*

By J. EDWARD COLLINS,  
*Of Counsel.*

No. 12,363

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

YOUNG BROTHERS, LIMITED, Claimant  
of the Tug "Kolo", her boats, en-  
gines, machinery, tackle, etc.,

*Appellant,*

VS.

JOHN CHO,

*Appellee.*

Appeal from the United States District Court  
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

---

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FILED

FEB 15 1913

WILLIAM F. QUINN,



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No. 12,363

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

YOUNG BROTHERS, LIMITED, Claimant  
of the Tug "Kolo", her boats, en-  
gines, machinery, tackle, etc.,

*Appellant,*

vs.

JOHN CHO,

*Appellee.*

Appeal from the United States District Court  
for the Territory of Hawaii.

**BRIEF FOR APPELLEE.**

---

**OPINION BELOW.**

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 25-28.

## **JURISDICTION.**

The jurisdiction of the United States District Court for the Territory of Hawaii over this cause in admiralty rests upon Title 28, United States Code, Section 1333.

The jurisdiction of this Court is founded upon Title 28, United States Code, Section 1291.

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## **PROCEEDINGS BELOW.**

On October 12, 1948, John Cho, appellee herein, libelled the tug Kolo, her boats, engines, machinery, tackle, etc., in an admiralty cause for negligent towage (R. 2-6). A stipulation for libellant's costs was filed, a monition for the arrest of the vessel issued, claim of owner Young Brothers, Limited, appellant herein, filed, together with a bond for the release of the vessel, all on October 12, 1948 (R. 7, 9, 11, 13). After answer of claimant, filed on November 5, 1948 (R. 14-19), the case came on for hearing on April 25 and 26, 1949. At the conclusion of the case, briefs were filed and the case was argued. Thereafter, claimant obtained leave to introduce additional evidence. Upon the termination of the new evidence, the court rendered his decision in favor of libellant John Cho and against the tug Kolo (R. 25-28). Pursuant thereto, a decree that libellant recover from the tug Kolo the sum of \$8,609.12, with interest until paid, was entered on June 8, 1949 (R. 29). Notice of appeal was filed on June 18, 1949 (R. 30).

**STATEMENT OF FACTS.**

On April 3, 1948 (R. 43), the Tenyo Maru, an Oil Screw Sampan, length 48.1 feet, breadth 10.7 feet, depth 5 feet, and net tonnage 9 (Ex. 1; R. 158), owned by John Cho, appellee, went aground on a reef off the island of Molokai, in the Hawaiian Islands, while on a commercial fishing voyage (R. 76). The captain of the Tenyo Maru at the time was Sam Kalani, Jr. (R. 51). He had a crew of two men (R. 54, 66). After notification on April 4, John Cho and his sister went to appellant Young Brothers, Limited, a salvage company, owner and claimant of the tug Kolo, respondent in the District Court. They talked to Captain Pavao, port captain of Young Brothers (R. 76) or to Mr. O'Neill, assistant port captain (R. 204). While they were at the Young Brothers' office seeking aid (R. 92) Mr. Edward Harrison, vice-president and manager of Young Brothers, was called on the telephone (R. 94), and John Cho requested assistance in salvaging his sampan (R. 76-77; 95). Joe Kahiapo, whom Cho had never met before (R. 98), employed by Young Brothers as master of the tug Kolo, came to the office while Cho and his sister were there (R. 76; 118). The Kolo was scheduled to go to Molokai the following morning (R. 76, 118). Arrangements were made for Cho to meet the tug Kolo at Kaunakakai, Molokai, on the following afternoon at 2:00 p.m. (R. 77, 93, 96, 120); Kahiapo was ordered to salvage the sampan—to do what he could for it (R. 76, 84, 92, 120, 127, 131). Kahiapo was admittedly inexperienced, this being his first salvage job (R. 123). He took the Kolo to Molokai where he

met Cho on Monday afternoon, April 5. At that time the tide was too low for the Kolo to be of any assistance to the grounded sampan, so Kahiapo took her to the harbor of Kolo where he was to work with a larger Young Brothers tug, the Mahoe, in taking pineapple barges in and out of the harbor (R. 132, 133). The captain of the Mahoe, Ching Ho, had been ordered by Young Brothers to proceed from Kolo to Kaunakakai and to assist the tug Kolo in pulling the Tenyo Maru off the reef (R. 225). On Thursday morning, April 6, while the Kolo stood by at the harbor of Kolo, the Mahoe went to Kaunakakai and viewed the grounded sampan. Ching Ho, the captain of the Mahoe, gave Cho some line and told him to prepare the Tenyo Maru to be towed off the reef. The Mahoe returned to the harbor of Kolo to pick up another pineapple barge brought out to her by the Kolo, and then the Kolo and Mahoe proceeded back to Kaunakakai, arriving there about 4:00 p.m. on Tuesday, April 6 (R. 133, 230). After an unsuccessful effort by the Kolo to pull the sampan off the reef by herself, the Mahoe secured a line to the Kolo, and the two tugs pulled the sampan off the reef (R. 231, 232). The Kolo took the sampan alongside the dock at Kaunakakai (R. 232). As a result of having been on the reef, the hull planking of the sampan was smashed and she was leaking through an area one and one-half feet long by three inches wide (R. 61, 78, 249). The damage was in a location below the water line where it could not be repaired either from the inside or the outside (R. 78). During the night of April 6, while the sampan was in the harbor, pumps

aboard the sampan were able to keep up with the leakage (R. 82). An attempt was made the following morning, Wednesday, April 7, to lift the sampan so that repairs could be made with the only serviceable crane at Kaunakakai harbor, but the sampan was too heavy (R. 267).

The Mahoe left Molokai about 6:30 p.m. on Tuesday night. Before he left, the captain of the Mahoe told Cho that he should call Young Brothers' home office if he wanted the Tenyo Maru towed to Honolulu (R. 236). Kahiapo told Ching Ho before the Mahoe left that he was going to tow the sampan to Honolulu, and Ching Ho said nothing (R. 135-139). Kahiapo considered it part of his job to take the sampan to a place where it could be fixed (R. 141). Captain Pavao, Young Brothers' port captain, likewise considered that a vessel isn't salvaged until it is taken to a port where it can be repaired (R. 257). After the Mahoe left, Kahiapo told Cho that a call to Young Brothers was unnecessary because towing the Tenyo Maru to Honolulu was already part of his responsibility (R. 81, 108).

The Kolo took the Tenyo Maru in tow at about noon on April 7 (R. 55). Sometime after the tug and tow entered Molokai channel about 1:45 p.m. (Interrogatories 3 and 6, R. 6, 20), the pumps aboard the sampan could no longer keep up with the water coming in (R. 56). Thereafter spray stopped the gasoline motor of the motor-driven pumps and the sampan gradually filled until it was submerged to the gunwales (R. 57, 72). The Kolo made no attempt to tow her in this

position (R. 126). Instead, the tug master, inexperienced and frightened, backed to within 20 feet of the sampan, taking up his towline, cut the line, and took the crew of the sampan aboard his tug, despite the advice of an experienced crew member on the tug that the line should not be cut because the sampan was floating (R. 144, 149, 150, 154). The tug left the partially submerged sampan in Molokai channel and returned to Honolulu (R. 149, 57).

An expert testified that Hawaiian sampans such as the Tenyo Maru do not normally sink (R. 201) and two experts stated that they did not know of any sampans lost by sinking (R. 201, 330). The expert called by appellant testified that the partially submerged sampan being towed astern would create little danger to the tug (R. 322). He told of other partially submerged sampans that had been towed to safety (R. 328, 329). A fisherman stated that his own sampan, much like the Tenyo Maru, had been badly damaged below the water line and had been towed to safety (R. 164). Captain Holm, appellant's expert, stated that the Tenyo Maru, if new, would float without question, and that wood four years old receiving normal care would retain its positive buoyancy (R. 326, 327). He attributed the precipitous action of the tug master to his inexperience (R. 318, 332), and thought that it could be explained by the fact that competent and experienced tug masters might demand too high pay for small tugs (R. 333).

The value of the sampan at the time of loss was estimated to be between \$8,000 and \$9,000 (R. 194).

Repairs due to the damage suffered by the sampan on the reef prior to her loss were estimated to cost \$600 to \$650 (R. 197). Judgment was awarded to appellee in the amount of \$8,000, together with interest and costs (R. 28), the district court finding that the master of the tug Kolo failed to exercise the care and skill required of him when he cut the Tenyo Maru adrift in Molokai channel and abandoned her, and that this negligence was the sole proximate cause of the loss of the sampan (R. 27).

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### QUESTIONS PRESENTED.

1. Should the findings of the trial judge, supported by the evidence, that the tug master's negligence was the sole cause of the loss of the Tenyo Maru be disturbed?
2. Has appellant carried its burden of proving that the owner or crew of the Tenyo Maru were negligent and that their negligence contributed to the loss of the sampan?
3. Can a master in lawful possession and control of a tugboat render the vessel liable *in rem* for the maritime tort of negligent towage irrespective of his authority to take vessels in tow?

### SUMMARY OF ARGUMENT.

The findings of the trial judge who heard all the testimony and is best able to determine credibility and resolve conflicts in inferences to be drawn therefrom should not be disturbed unless clearly erroneous. Findings which are supported by evidence in the record are not clearly erroneous. The findings of the trial judge are supported by the evidence and should not be disturbed.

The actions of the master of the tug Kolo were manifestly negligent. The evidence shows that no emergency situation existed when the towline was cut and the sampan abandoned. Abandonment casts the burden of justifying the action upon the tug. Appellant failed to prove any justification. Although the owner of the Tenyo Maru might have been negligent in allowing his unseaworthy boat to be taken in tow, the trial court found that the unseaworthiness and John Cho's negligence were not the cause of the loss of the sampan. This finding is amply supported in the record.

The actions of the captain of the Tenyo Maru after the tow was undertaken, and after the abandonment of the sampan, raise no inference of negligence contributing to the loss of the sampan and were properly disregarded by the trial court.

Negligent towage is a maritime tort creating a maritime lien in the offending vessel. American admiralty law, in creating the maritime lien as a *jus in re*, personifies the vessel as the tortfeasor irrespective of the authority of her master and crew so long as the person in control has lawful possession. This applies



whether the tort is negligent or wilful, and whether it is negligent towage or some other kind of wrongful action.

Negligent towage gives rise to a cause of action against, and a lienor's interest in, the offending vessel whether or not a contract of towage exists between the tow and the tug, and despite the fact that the owner of the tug may not be personally liable.

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### ARGUMENT.

- I. THE FINDING OF THE DISTRICT JUDGE THAT THE PRECIPITOUS CUTTING ADRIFT AND ABANDONMENT OF THE TENYO MARU WAS NEGLIGENCE IS AMPLY SUPPORTED BY EVIDENCE AND SHOULD BE SUSTAINED.
- A. Findings of fact of the Trial Court who heard the witnesses should not be disturbed.

While it is sometimes said that an appeal in admiralty is a trial *de novo*, it is universally held that the findings of a trial court on testimony and evidence taken in his presence should not be disturbed whenever they find support in the evidence adduced.<sup>1</sup> The appellant failed to introduce evidence to contradict the facts shown by appellee with respect to the unnecessary abandonment of the Tenyo Maru in Molokai channel. Nevertheless appellant seeks to have this court draw different inferences from the evidence than those drawn by the court. To the extent that conflicting inferences could be drawn, the conflict was resolved by the trial court when he made his findings

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<sup>1</sup>*Drain v. Shipowners & Merchants Tugboat Co.*, 149 F. (2d) 845 (CCA 9th, 1945).

of fact pursuant to Admiralty Rule 461½.<sup>2</sup> Since the evidence supports the inferences drawn by the trial court, his findings of fact based thereon should be accepted by this court.<sup>3</sup> This is likewise true as to the trial court's determination that the action of the master of the Kolo was negligence, which was the sole proximate cause of the loss of the Tenyo Maru.<sup>4</sup> The standards of reviewability of findings of fact in admiralty are similar to those established in the Federal Rules of Civil Procedure for the review of findings of a court without a jury.<sup>5</sup> Applying these standards, we submit the trial court's findings are clearly supported by the evidence and in fact reflect the situation pictured by the preponderance of the evidence. Therefore, the findings and conclusions of the trial court should be affirmed.

**B. The Trial Court's findings are supported by the evidence.**

The findings of fact important to the determination that the master of the Kolo was negligent and that his negligence caused the loss of the Tenyo Maru are Findings (6) through (9) and appear in the record at pages 26-27.

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<sup>2</sup>28 U.S.C. following Sec. 723.

<sup>3</sup>*Stetson v. U.S.*, 155 F. (2d) 359 (CCA 9th, 1946); *Johnson v. Andrus*, 119 F. (2d) 287 (CCA 2nd, 1941).

<sup>4</sup>*Bornhurst v. United States*, 164 F. (2d) 789 (CCA 9th, 1947); *Virgin v. U.S.*, 165 F. (2d) 81 (CCA 4th, 1947); *Royal Exchange Assurance Co. v. Graham and Morton Transportation Co.*, 166 Fed. 32, 36 (CCA 7th, 1908).

<sup>5</sup>F.R.C.P., Rule 52 (a): “. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .” See *Johnson v. Andrus*, supra, at p. 288.

In Finding number (6) the trial court finds that the sampan was being towed astern of the tug at the time she had taken water so that her decks were awash.<sup>6</sup> This fact appears in the testimony of Joseph Kahiapo, the captain of the tug Kolo. He testified that the sampan was 75 to 80 yards behind the tug when he first noticed she was riding low (R. 126). At the time he cut the towline, the sampan was about 20 feet astern of the tug (R. 144).

The trial court found that Joseph Kahiapo was an inexperienced tug master, having no prior experience in open sea towing.<sup>7</sup> Kahiapo's own statement affords a basis for this finding: "That was my first salvage operation, and I wouldn't say I was too experienced on that job" (R. 123).

The court found that Kahiapo's inexperience was the primary factor influencing him to cut the towline when he first saw that the sampan was low in the water. The court also found as a fact that an experienced crewman on the tug had advised Kahiapo not to cut the towline because the sampan would not sink. Ample support for these findings is contained in the testimony of Abell, the crewman on the tug, that Kahiapo was frightened and cut the line although he, Abell, told Kahiapo the sampan was floating (R. 149, 150, 154). On this question the court also had the benefit of the testimony of Captain Holm, a well qualified expert in salvage operations, that Kahiapo's lack of experience was probably the cause of his setting

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<sup>6</sup>R. 26.

<sup>7</sup>R. 26, Finding No. (7).

the sampan adrift (R. 332). If he were as inexperienced, said Captain Holm, he might have done the same thing (R. 334), but knowing what he did, he would not have cut the line (R. 332). These excerpts from the record not only support the trial court's Finding number (7)—they demonstrate that no other finding was possible on the testimony before the court.

Finally, the court found that the sampan had sufficient positive buoyancy to remain afloat and that she could have been towed to Honolulu had she not been cut loose. The ship builder who had worked on the sampan in 1945 testified that they had done a major repair job on the sides, bottom and cabin of the Tenyo Maru (R. 173), costing four to five thousand dollars (R. 174). Mr. Cho, the owner of the Tenyo Maru and appellee herein, testified that from August 1946 until April 1947, the sampan was repaired regularly every three to five months, all necessary repairs being done each time (R. 185).

Captain Holm, the expert, testified that sampan wood four years old would remain positively buoyant (R. 323). He and Mr. Leary, another expert, testified that they knew of no instances when Hawaiian sampans were lost through sinking (R. 330, 200-201). Mr. Leary stated that such vessels do not normally sink (R. 198, 201). Mr. Kagimoto told of his sampan, similar to the Tenyo Maru, which was safely towed in after a collision (R. 146). Captain Holm gave instances of sampans awash and damaged below the water line which were towed to safety (R. 328-9).

When the tug left for Honolulu the Tenyo Maru was floating with the water up to her gunwales (R. 57).

As against this sturdy evidential support of the trial judge's findings, appellant suggests that the situation was in fact an emergency, with the lives of the crews of sampan and tug in the balance.<sup>8</sup> So it is said that the master is not at fault even if he makes a wrong choice when confronted suddenly with the necessity of making some choice. This interpretation is contrary to the evidence and, indeed, is expressly disavowed by the district court on the grounds of credibility. Thus the court says he can "hardly believe" Kahiapo's story of the rapid filling of the sampan (R. 336). So long as the sampan was being towed astern, Captain Holm expressed the opinion that there was little danger of a condition occurring so rapidly it could not be taken care of (R. 322).

It is significant that the other eye witnesses, Kalani, the master of the sampan, and Abell, the tug crewman, did not mention that the situation was touched with danger at all. Abell's only remark that concerned the question was his appraisal of Kahiapo as being "scared" (R. 154).

Appellant assigns numerous errors to the district court's findings of fact as set forth above.<sup>9</sup> However, the argument in support of the assignment is not directed to a showing that there was no substantial evidence to support the district court's findings, or that

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<sup>8</sup>Appellant's Brief, pp. 28-32.

<sup>9</sup>Assignments of error numbers 6, 7, 8, 9 and 11, R. 35-37; see Appellant's Brief, pp. 25-26.

such findings were "clearly erroneous." Instead, appellant attempts to have other inferences drawn from the evidence which might tend to support its claim of no negligence.

**C. The findings of fact made by the Trial Court support a determination that the master of the Kolo was negligent.**

The district court found that the master of the Kolo cut the Tenyo Maru adrift and abandoned her because of his inexperience (R. 26), and that such action was unnecessary because the sampan would have remained afloat and could have been towed safely to Honolulu (R. 27). The findings are supported by the evidence adduced in the presence of the court (Section I B above). Appellant argues that such facts do not prove negligence and that other facts should have been proved before negligence could be inferred. It cites cases relating to the duty imposed upon the master of a vessel in an emergency.<sup>10</sup>

In *The Stirling Tompkins* the tug pleaded that it had done its best in a dense fog and that the damage to one of its tows was an accident not due to any carelessness on its part. The court of appeals recognizes that so long as proper seamanship is displayed, a mere error in judgment will not be negligence. But the court, without the aid of experts, found that the tug should have but did not give appropriate signals to its auxiliary tugs. And the court said:

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<sup>10</sup>See *The SS Bellatrix*, 114 F. (2d) 1004 (CCA 3rd, 1940); *The Stirling Tompkins*, 56 F. (2d) 740 (CCA 2nd, 1932), cited in Appellant's Brief, pp. 29-30.

The grounding of the tow called for an explanation. The attempted explanation was the presence of a dense fog, but the tug had to meet the *prima facie* proof of fault occasioned by grounding her tow by showing not only that she was in a troublesome fog, but that her master did everything that a skillful navigator should have done while in a fog to keep the tow in line . . . In our opinion, no explanation sufficient to justify the grounding has been given. (p. 742.)

In the instant case, the evidence clearly showed that in its partially submerged condition, the sampan was in no danger of sinking, and presented no danger to the tug. It could have been towed to Honolulu. If the master of the Kolo had some justification for cutting the tow adrift and abandoning her, the burden was upon Young Brothers to prove it.<sup>11</sup> This they have failed to do.

Arguing in terms of emergency situations is going far afield. In *The SS Bellatrix*,<sup>12</sup> a tug had a "dead" vessel in tow. As the tug and tow approached a drawbridge, one side of the bridge lifted fully but the other side failed to rise sufficiently to allow the vessels to pass. A squall hit at the same time. The tug went full speed astern but the tow's momentum carried it into the defective bridge leaf. It was argued that if the tug had taken different action damage might have been avoided. The court, however, held that the tug master had a right to assume the drawbridge was

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<sup>11</sup>*The Stirling Tompkins*, supra.

<sup>12</sup>114 F. (2d) 1004 (CCA 3rd, 1940).

functioning properly and that his action in the emergency could not be challenged from a nautical standpoint. At most, it was an error in judgment.

In the above case, damage was bound to result unless the master did something; in our case, damage would not have resulted except for the action taken by the master.

There is no question that Kahiapo thought he was doing the right thing. He was frightened for the safety of his tug. He cut the tow adrift and abandoned her on the assumption that she was sinking, even though he was told the contrary by his own crewman. An honest intention to do the best he can under the circumstances will not exonerate the tug master unless it is also shown that he acted "in the exercise of the reasonable discretion of experienced navigators".<sup>13</sup>

Experienced navigators are charged with knowledge of "such information as is current in the calling".<sup>14</sup>

When the nature of anchorages is involved, a master is required to know the information disclosed by Geodetic Survey Charts.<sup>15</sup>

When the question arises of whether a partially-submerged sampan under tow should be abandoned or the towing continued, the tug master should be held to know that which is current in the calling, i.e., that sampans do not normally sink, and that they can be

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<sup>13</sup>*The Nannic Lamberton*, 85 Fed. 983 (CCA 2nd, 1898).

<sup>14</sup>*The Harford*, 159 F. (2d) 486 (CCA 2nd, 1947); cert. denied 331 U.S. 848 (1947).

<sup>15</sup>*Ibid.*



and have been safely towed into port when they are in that condition.

Tugs have a duty of a high degree of diligence to save a tow that has gone adrift, for to abandon it is to commit it to certain loss.<sup>16</sup>

Where a hawser had parted several times, and high winds had so damaged the tow that her crew boarded the tug and the tug left the tow and retreated to a protected anchorage, it was held that the action of the tug master

showed neither good judgment, fidelity to his charge, nor that sturdy and obdurate endeavor to hold onto his tow that the law should demand under the conditions then existing.<sup>17</sup>

Similarly, where the tug captain thought the tow would founder, so he cut the towline, took aboard the crew of the tow and abandoned the latter, the court held that

there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he was deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.<sup>18</sup>

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<sup>16</sup>*Atkinson v. Scully*, 246 Fed. 463 (1917).

<sup>17</sup>*In re Moran*, 120 Fed. 556, 563 (1903).

<sup>18</sup>*Appeal of Cahill*, 124 Fed. 63, 64 (CCA 2nd, 1903); Accord: *Maryland Transp. Co. v. Dempsey*, 279 Fed. 94 (CCA 4th, 1921); *The O. L. Halenbeck*, 110 Fed. 556 (1901); *The Bronx*, 14 F. (2d) 482 (1926).

Appellant argues that the towline had to be cut in order to save the crew of the sampan.<sup>19</sup> The master of the Kolo testified that the sampan went down rapidly and the crew was clinging to the submerged part of the cabin (R. 124). He also said the crew was signalling for the tug to come back to pick them up (R. 143). Appellant places considerable reliance on this testimony. However, the trial court apparently placed little credence in the emergency situation painted by Kahiapo (R. 336). Kalani, the captain of the sampan, testified that the water was right below the gunwale (R. 56) and that no part of the main deck was under water (R. 72). He testified that he signalled the tug that he was taking on water and that the pump had stopped (R. 56, 68), and that all the master of the tug did was to cut the towline (R. 57). Abell, the crewman on the tug, testified that the sampan sank down to about the level of the deck (R. 149). He did not describe any emergency with respect to the personnel on board the sampan. We submit that the record fails to justify the inference which appellant attempts to draw.

Appellant has not shown that the crew of the sampan could not have been taken off while the towline was still holding to the sampan, although it is shown that the tug master didn't cut the line until the sampan was only twenty feet away (R. 144) and that the crew of the sampan swam to the tug after the line was cut (R. 57).

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<sup>19</sup>Appellant's Brief, pp. 31-33.

The burden of showing that nothing further could be done to aid the sampan was on the tug, after the abandonment of the floating sampan was proved by its owner.<sup>20</sup> The record supports the finding that the sampan would float and could be towed to Honolulu. Nevertheless, appellant argues that the actions of the tug master could not be the proximate cause of the loss of the sampan because it is not proved that she floated for five minutes after she was abandoned.<sup>21</sup>

However, it is clearly established in the law of negligent towage that if fault of the tug is established, as it was here, then the tug must affirmatively show that the failure to take proper measures to save the tow did not in fact cause the damage.<sup>22</sup> Once salvage is shown to be probable, the burden is on the tug to show that further towing would have been useless.<sup>23</sup> The tug Kolo and her claimant have not, and can not, make such a showing in this case.

Even if the circumstances had justified the captain of the Kolo in cutting the towline and taking the crew of the sampan aboard, he was not justified in deserting the tow or making no further efforts to save her.<sup>24</sup>

Appellant seeks to justify the desertion of the sampan by pointing to the fact that the evidence does not disclose any objection to his course of action by the

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<sup>20</sup>*In re Moran*, supra; *Appeal of Cahill*, supra; *The O. L. Halenbeck*, supra.

<sup>21</sup>Appellant's Brief, p. 31.

<sup>22</sup>*The Betty*, 278 Fed. 220 (1922).

<sup>23</sup>*The O. L. Halenbeck*, supra.

<sup>24</sup>*Appeal of Cahill*, supra; *The O. L. Halenbeck*, supra.

captain of the sampan. The evidence does not show, in the first place, that the captain of the sampan signalled to be taken off the sampan, as contended by appellant. Secondly, and of greater significance, the tug cannot by such assertions shift its duties to its tow.

Naturally, if the tug cuts a line and signals the crew to get off it will comply. As was pointed out in *In re Moran*,<sup>25</sup> the fact that the crew left the tow doesn't justify desertion. The tug has dominion over the tow. The arbitrary power of the tug master is known. What he directed to be done would be accepted without dissent by the crew of the tow.

This reasoning applies equally to the alleged desire of the crew of the sampan to leave their ship and to the failure of the sampan's captain to object to the tug's abandonment of his ship.

*The Asher J. Hudson*,<sup>26</sup> cited by appellant, does not require that the master of the sampan express an opinion that his ship would not sink. There it was clearly shown that the crew of both the tug and the tow reasonably believed the tow would sink. In the instant case, there is no evidence of what the crew of the tow thought would occur. There is evidence that the captain of the tug thought his tug was endangered, and there is evidence from a crew member of the tug and from experts that the sampan would

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<sup>25</sup>120 Fed. 556 (1903). The crew of the tow apparently asked to be taken aboard the tug.

<sup>26</sup>154 Fed. 354 (CCA 2nd, 1907) ; Appellant's Brief, p. 32.

not sink. To cast the tow loose when there was no immediate danger of its sinking and no danger to the tug, was blatant disregard of the property rights of the owner who had entrusted his vessel to the care of the tug. The tug master's belief was not a reasonable one but was based upon, and was found by the trial court to be based upon, his inexperience as a tug master.

Appellant having failed to carry the burden of proving that the abandonment of the Tenyo Maru by the Kolo was justified, the trial court properly found on the facts that the tug master did not exercise the care and diligence required of a prudent tug master to save his tow.

**D. The evidence supports the Trial Court's determination that the negligence of the tug master was the sole proximate cause of the loss of the Tenyo Maru.**

It is stated that negligence of the owner and crew of the sampan Tenyo Maru contributed to her loss so that appellee must bear a part of the damages suffered by him.<sup>27</sup> This assertion is based upon the owner of the sampan's knowledge of her unseaworthiness at the commencement of the tow, and upon the appellant's interpretation of the evidence that the crew of the sampan was negligent in failing to give proper signals and in failing to take affirmative action to prevent the abandonment of the sampan.

We agree with the proposition that if the tow is lost due to her unseaworthiness, known both to her

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<sup>27</sup>Appellant's Brief, pp. 34-41.

owner and to the tug master, then each vessel is responsible for the loss and appellee can only recover a portion of his damages against the Kolo.<sup>28</sup>

However, the district court, while finding that the Tenyo Maru was unseaworthy and that this was known to John Cho and to the tug master, went on to find that this unseaworthiness was not the cause of the sampan's loss (R. 27). This finding, though it might be considered one of ultimate fact, will not be set aside unless it clearly appears that it is either unsupported by the evidence or against the evidence.<sup>29</sup>

The evidence supporting the trial judge's findings that the sampan would have floated and could have been towed to Honolulu is reviewed above.<sup>30</sup> From the evidence and the findings it is apparent that the loss was caused not by the sampan's unseaworthiness, but by the tug master's utter neglect of his duties after the sampan had taken water to the extent that she was down to her gunwales. That a tow is unseaworthy is no justification for her abandonment. The tug carries the burden of taking reasonable and prudent action to protect an unseaworthy tow from loss.<sup>31</sup> The wrongful abandonment of the tow having been shown, it was incumbent upon the Kolo to demonstrate that

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<sup>28</sup>*Mason v. The Steam-Tug "William Murtaugh"*, 3 Fed. 404 (1880); *The Bordentown*, 16 Fed. 270 (1883).

<sup>29</sup>*Royal Exchange Assurance Co. v. Graham and Morton Transportation Co.*, 166 Fed. 32, 36 (CCA 7th, 1908).

<sup>30</sup>Section I B above.

<sup>31</sup>*Du Bois Sons Co. v. Penn. R. Co.*, 47 F. (2d) 172 (CCA 2nd, 1931); see *McCormick v. Jarrett*, 37 Fed. 380 (1889); *Wilson v. Sibley*, 36 Fed. 379, 383 (1888).

further efforts would have been fruitless.<sup>32</sup> Appellant failed to carry this burden.

Assuming that the sampan sank in the water to the level of the gunwales due to her unseaworthiness, presumably this would have occurred irrespective of any signals from the tow to the tug. Signalling was wholly unconnected with the loss which occurred. The acts of the Kolo complained of took place after signals were given (R. 56). Furthermore, the master of the Kolo established a system of signals with the tow which amounted merely to his waving to the tow every half hour (R. 141). And Kalani, the captain of the Tenyo Maru, testified that the tug master did not respond to his signals given after the ship was down in the water (R. 57) and apparently didn't even see them (R. 56).

Appellant does not suggest what intelligence the sampan could have communicated to the tug by signalling before the gas pump stopped, in view of the incomplete signalling procedure set up by the tug. When a tug undertakes a tow and supplies the motive power—

she becomes the dominant mind, and the tow is required to follow directions from the tug.<sup>33</sup>

If the tug failed to make adequate provision for signalling, the fault lies with the tug and is negligence chargeable to her.<sup>34</sup>

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<sup>32</sup>*Appeal of Cahill*, 124 Fed. 63 (CCA 2nd, 1903).

<sup>33</sup>*The Benning*, 44 F. Supp. 645, 648 (1942); *The Express*, 8 Fed. Cas. 171, No. 4209, 3 Cliff. 462 (1871).

<sup>34</sup>Cf. *The Stirling Tompkins*, 56 F. (2d) 740 (1932).

We submit that signalling from tow to tug in the period before the *Tenyo Maru* was abandoned was properly disregarded by the district court in determining liability for the loss of the sampan, because faulty signalling did not cause the loss and because the fault, if any, in the signalling is attributable to the tug.

Appellant suggests that the lack of any evidence on the attitude of Kalani toward the abandonment of the sampan demonstrates that he did not take adequate steps to save her and is therefore equally responsible for her loss.<sup>35</sup>

The burden of proving negligence of the sampan's crew contributing to her loss was on appellant.<sup>36</sup> The admission that the record is silent as to Kalani's claim is sufficient to preclude the question not urged below from being considered by this court. Inferences cannot be drawn from the silent record that Kalani did not object, any more than the lack of testimony proves that he did. Appellant has failed to carry the burden of proof on this matter.

In any event, the failure of the sampan's captain to argue with "the dominant mind" of the tug is not negligence and could not have caused the loss or increased the damage suffered by appellee.<sup>37</sup> Whatever the tug master directed be done would be accepted without question by the sampan's crew.<sup>38</sup> He gave

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<sup>35</sup>Appellant's Brief, p. 40.

<sup>36</sup>*The Anna O'Boyle*, 122 F. (2d) 286 (CCA 2nd, 1941).

<sup>37</sup>*In re Moran*, 120 Fed. 556 (1903).

<sup>38</sup>*Ibid.*



them no chance to protest before he cut the towline (R. 57). Thereafter, they were on his vessel, he was captain, his mind was made up (R. 152-3), and argument on their part would have been useless.

John Cho's action in allowing his unseaworthy sampan to be taken in tow in no way contributed to the loss of the vessel because after the unseaworthiness had spent its force the ship could have been towed safely to Honolulu had it not been precipitously abandoned (R. 27). Appellant has failed to prove any contributing fault on the part of the sampan's crew. The district court's finding that the negligent abandonment of the tow was the sole cause of its loss should be sustained as amply supported by the evidence taken before him.

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## II. THE TUG KOLO IS LIABLE FOR THE NEGLIGENCE OF HER MASTER.

### A. The authority of the master is immaterial.

The record presents no question concerning the lawful possession of the Kolo by Joseph Kahiapo as its master. The authority of Kahiapo to take the Tenyo Maru in tow to Honolulu is questioned, however, and it is asserted that John Cho, owner of the Tenyo Maru, should have known of such lack of authority. It is then contended that the tug Kolo cannot be held liable *in rem* for the maritime tort of negligent towage during an unauthorized tow.

It has long been recognized in American admiralty law that a ship is

a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible . . .<sup>39</sup>

she acquires a personality of her own; becomes competent to contract and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents.<sup>40</sup>

Justice Story said, in construing a statute making the vessel responsible for an offense of piracy, that the vessel is treated in admiralty as the offender without regard to the personal responsibility of the owner.<sup>41</sup>

This personification of the ship as the juristic person, the offending thing, differs radically from the view taken by the English admiralty courts wherein it is held that the ship is not responsible in admiralty where the owner would not be at common law.<sup>42</sup>

Implementing this theory, the Supreme Court has held that a maritime lien may be enforced against a ship for negligent navigation even though the ship were under the control of a pilot whom the owner

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<sup>39</sup>*Canadian Aviator, Ltd. v. U.S.*, 324 U.S. 215, 224 (1945).

<sup>40</sup>*Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

<sup>41</sup>*U.S. v. The Brig Malek Adhel*, 2 How. (15 U.S.) 210, 233 (1844).

<sup>42</sup>*Homer Ramsdell Transp. Co. v. La Campagnie General Transatlantique*, 182 U.S. 406 (1901); *The William H. Bailey*, 103 Fed. 799 (1900).

was required by law to put into command at the time the negligence occurred.<sup>43</sup>

In an earlier case under the embargo act, a vessel was proceeded against *in rem* because her master had filed a false report. In answer to the owner's argument that the master acted without authority, Marshall, C. J., said:

But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offense committed by the vessel which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner.<sup>44</sup>

Similarly, a vessel under charter to a person who furnished his own master and crew is nevertheless subject to a maritime lien for tortious conduct while under the charter.<sup>45</sup>

Even an intentional act of harm done by one ship to another through the spite of her master will render the first ship liable *in rem* despite the obvious lack of authority of the master to do the act. Thus where a tug master intentionally damaged another vessel by coming close aboard and blowing his boilers, the ship was held liable.<sup>46</sup>

The court replied to the owner's contention that the ship should not be held for the unauthorized, inten-

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<sup>43</sup>*The China*, 7 Wall. (74 U.S.) 53 (1868) ; this is the leading case on the question of the vessel's liability where there would be none on the owner.

<sup>44</sup>*The Little Charles*, 26 Fed. Cas. 979, 982, No. 15,612 (1818).

<sup>45</sup>*The Barnstable*, 181 U.S. 464 (1901).

<sup>46</sup>*The Bulley*, 138 Fed. 170 (1905) ; but the vessel is not held for punitive damages; *The William H. Bailey*, *supra*.

tional and malicious action of her master, by conceding that—

Under the law of master and servant there might be much to sustain the claimant's position, as it is admitted that the act was a wilful one of some person on the tug, not within the scope of his employment, yet under the maritime law it seems to be well settled that a vessel committing a tort is liable therefor, notwithstanding an unauthorized act on the part of some person on board.<sup>47</sup>

Negligent towage is a maritime tort in American admiralty law. It gives rise to a maritime lien which receives the same priority and is treated in all respects like a maritime lien arising in a collision case.<sup>48</sup>

Appellant concedes the above principles but suggests that since "the background of the case is contractual",<sup>49</sup> admiralty principles applicable to contract situations should be used to determine the instant case.

But the liabilities in negligent towage have often been said to arise out of independent duties of care and skill resulting from the tower-towed relationship irrespective of the existence or nature of any towage contract. So the tug will be liable for negligent towage even though the contract of towage specifies that

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<sup>47</sup>*The Bulley*, supra, p. 171; the court cited *The John G. Stevens*, infra, the leading case on negligent towage, in support of this proposition.

<sup>48</sup>*The John G. Stevens*, 170 U.S. 113 (1898).

<sup>49</sup>Appellant's Brief, p. 24.

the vessel was being towed at her own risk,<sup>50</sup> or indeed if there is no towage contract at all.<sup>51</sup>

In a case involving towage similar to *The China*, *supra*, it was held that a tug operating under the directions of a harbor master who had full control and who was not under the control or authority of the owner of the tug should nevertheless be held liable for negligent towage.<sup>52</sup> So also, a vessel taken in tow without charge by the master can hold the tug for negligent towage.<sup>53</sup>

The above authorities make it clear that the liability *in rem* of a vessel for maritime torts exists irrespective of the authority of the crew of the vessel to engage in the operation out of which the tort arose. This is true whether the tort is negligent or wilful, and, we submit, is as true for the tort of negligent towage as for any other wrong.

Appellant cites three cases said to create an exception to the general rule, to the effect that a tow cannot hold her tug for negligent towage if her owner or master knows or should have known that the towage was undertaken without authority. The leading case for this proposition is *The R. F. Cahill*, decided by Federal Judge Batchford in 1878.<sup>54</sup> There the evidence showed that the master had no authority to

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<sup>50</sup>*The Steamer Syracuse*, 12 Wall. (79 U.S.) 167 (1870).

<sup>51</sup>*The Temple Emery*, 122 Fed. 180 (1903).

<sup>52</sup>*Rice v. The Marion A. C. Mesick*, 148 F. (2d) 522 (1945).

<sup>53</sup>*King v. Red Star Towing and Transportation Co.*, 48 F. (2d) 633 (1931).

<sup>54</sup>20 Fed. Cas. 627, No. 11,735; 9 Ben. 352 (1878).

make the tow, and that the tow's owner knew this to be true. The court stated as its guiding principle:

The act of the servant must be done in the course of his employment, in order to make his master liable civilly for the tortious or negligent act of the servant. (p. 628.)

This is a plain statement of the rule of *respondeat superior* not applicable to admiralty proceedings *in rem ex delicto*.<sup>55</sup> In support thereof, the court cited *inter alia* a personal injury case wherein a stockholder of a railroad riding as a guest sued the railroad for personal injuries and it was held that the doctrine of *respondeat superior* rendered the railroad liable for the negligent act of its servants in the course of their employment.<sup>56</sup>

In *The Andrew J. White*<sup>57</sup> the tug master and tow owner both knew that the master has been forbidden to enter a slip to pick up the tow. Without citing any authorities, the court held that this limited the otherwise general authority of the master to bind the vessel.<sup>58</sup> Believing an authorized contract to be necessary<sup>59</sup> the court then determined that the tug was not liable.

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<sup>55</sup>“*Respondeat Superior in Admiralty*”, 19 Harv. L. Rev. 445; see p. 447, “A careful perusal of the authorities above referred to cannot fail to convince anyone that the liability *in rem ex delicto* in the admiralty has no connection with the law of master and servant or with the maxim *respondeat superior*.”

<sup>56</sup>*Philadelphia & Reading R. Co. v. Derby*, 14 How. (20 U.S.) 291 (1852).

<sup>57</sup>108 Fed. 685 (1901).

<sup>58</sup>See *Story on Agency*, 9th ed., Sec. 116 et seq.

<sup>59</sup>Contrary to *The Temple Emery* and *The Steamer Syracuse*, *supra*.

In *The Oceanica*<sup>60</sup> the third of appellant's three cases, the question was whether the towing contract could relieve the tug of responsibility for negligently causing damage to the tow. The court held that it could, distinguishing and refusing to follow *The Syracuse*<sup>61</sup> in order to reach this result. The court's view that *in rem* liability is dependent upon and limited by the contract was thus manifested.<sup>62</sup> It was then argued on rehearing that since the tug had taken the tow beyond the original destination stated in the contract, the contract limitation should not apply, but the court said that the owner of the tow knew that the tug was unauthorized to continue so that either there was a contract and the limitation applied or there was not, the deviation was unauthorized, and the tug was not liable. The only cases cited were *The R. F. Cahill* and *The Andrew J. White, supra*.<sup>63</sup>

The foregoing three cases have never been cited in any other admiralty action. We submit that they are clearly erroneous and contrary to the great weight of American admiralty authority and should not be considered by this court.

Appellant argues that Federal statute has limited the creation of maritime liens and infers that such

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<sup>60</sup>170 Fed. 893 (CCA 2nd, 1909).

<sup>61</sup>12 Wall. (79 U.S.) 164, *supra*.

<sup>62</sup>The doctrine of *The Syracuse* was reaffirmed by the Supreme Court in *Compania de Navegacion Interior S. A. v. Fireman's Fund Insurance Company*, 277 U.S. 66 (1928), at p. 73.

<sup>63</sup>See lower court opinion, *The Oceanica*, 144 Fed. 301 (1906), for what we consider a sounder disposition of this case. Note that lower court finds as a fact that the owner of the tow knew of no limitation on the tug master's authority and that this finding was ignored on appeal.

limitation should be judicially extended as a matter of public policy.<sup>64</sup>

However, the Federal Maritime Lien Act,<sup>65</sup> instead of limiting maritime liens, greatly increased the number of occasions when they would arise by creating them in favor of supplier in the domestic port of a ship, whereas formerly they were available only to suppliers in foreign ports.<sup>66</sup>

The public policy of this statute stands in favor of the maritime lien as a suitable and proper means of assuring payment to persons furnishing supplies to or suffering damage from the actions of a ship.

If this were an action *in personam*, the arguments of appellant relating to the master's authority would have merit. Being an *in rem* proceeding, however, with the tug Kolo shown to have been acting in her owner's service, even if not authorized to do so, we submit that the authority of her master is immaterial and that the tug Kolo should be held liable as the wrong-doing vessel pursuant to traditional admiralty doctrines.

**B. Appellee did not know of any lack of authority on the part of the master.**

The cases relied upon by appellant stress the collusion between owner of the tow and master of the tug and the knowing and deliberate flouting of the

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<sup>64</sup>Appellant's Brief, p. 23.

<sup>65</sup>Act of June 23, 1910, 36 Stat. 604, as amended by Act of June 5, 1920, 41 Stat. 1005; 46 U.S.C., Secs. 971-975.

<sup>66</sup>*The Little Charley*. 31 F. (2d) 120, 122 (1929); cf. Anno, 70 L.R.A. 356, 411.



instructions issued to the master of the tug by her owner.

Appellant not only urges the application of a novel and discredited theory, but asks the court to expand the theory in the application. In *The R. F. Cahill*<sup>67</sup> the court found

that the libellant knew that the limit of towing was Fifty-first Street and promised the master of the tug that he would pay him extra if he would take the canal boat from Fifty-first Street to Fifty-seventh Street, and that he would keep the fact concealed from the owners of the tug . . . (p. 628).

In *The Andrew J. White*<sup>68</sup> the court described the situation that

the captain of the Minnie knew that the owner of the tug declined to have the tug draw the barkentine out of the slip, and that the master of the tug, in undertaking the office, assumed to do an act which the owner had declined specifically to allow him to do. (p. 688.)

*The Oceanica*<sup>69</sup> shows the same assumption by the court:

the owners of the barge knew that the contract was to tow simply to Buffalo.

This knowledge on the part of the tow owner is clearly not present in the record in this case. The master of the Kolo told appellee that he could tow

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<sup>67</sup>20 Fed. Cas. 627, No. 11,735; 9 Ben. 352 (1878).

<sup>68</sup>108 Fed. 685, 688 (1901).

<sup>69</sup>170 Fed. 893, 897 (1909).

the sampan to Honolulu (R. 81). The captain of the tug thought he was authorized to make the tow to Honolulu, and, in fact, had good reason for wanting to do so (R. 121, 122, 127). He told his fellow tug master that he was going to make the tow (R. 135, 139) and he received no contrary instructions (R. 139).

Despite this infirmity in its authorities, appellant argues that the Kolo would not be liable if John Cho should have known or had notice of the lack of authority of her master.

This view would clearly require an existing, valid towage contract as a prerequisite to recovery for towage contrary to the express holdings of the Supreme Court.<sup>70</sup> For if John Cho had no knowledge or notice of a deficiency in the authority of the master of the Kolo, then the towage contract would certainly bind Young Brothers.<sup>71</sup> We submit that the attempted extension of the foregoing three cases to to preclude recovery where there is notice of lack of authority, as well as where there is actual knowledge and bad faith, is clearly erroneous.

**C. The towage contract made by the master of the tug Kolo with the owner of the Tenyo Maru effectively bound the owner of the tug.**

The district court made no finding with respect to appellee's knowledge of the lack of authority of the

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<sup>70</sup>*The Quickstep*, 9 Wall. (76 U.S.) 665, 670 (1869); *The Syracuse*, 12 Wall. (79 U.S.) 167 (1870).

<sup>71</sup>*Story on Agency*, 9th ed., Sec. 116, p. 129; *Restatement, Agency*, Sec. 161.

master of the Kolo (R. 291). He found that the tug master had no express authority.

The master of a ship has the power to bind his principal by entering into all contracts belonging to the ordinary employment of the ship.<sup>72</sup> John Cho, appellee, had no notice of any limitation on the authority of the Kolo's master. Such notice cannot be found in the remark made by the master of the Mahoe to Cho to call Young Brothers to make arrangements for a tow to Honolulu (R. 233) because the master of the Kolo subsequently told Cho that he already had that authority (R. 141). The instructions to Kahiapo, master of the Kolo, to do the best he could for the sampan (R. 123) and to salvage the vessel (R. 127) reasonably interpreted mean to take the vessel off the reef and to a port where adequate repair facilities existed (R. 257). In any event, such instructions were ambiguous and Young Brothers is bound by Kahiapo's reasonable interpretation of them.<sup>73</sup>

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<sup>72</sup>*Story on Agency*, 9th ed., Sec. 116, p. 129.

<sup>73</sup>*Restatement, Agency*, Sec. 44.

**CONCLUSION.**

For the reasons set forth above, we ask that the judgment of the District Court for the Territory of Hawaii be affirmed.

Dated, Honolulu, Hawaii,  
February 15, 1950.

Respectfully submitted,  
J. GARNER ANTHONY,  
WILLIAM F. QUINN,  
*Proctors for Appellee.*

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No. 12,363

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

YOUNG BROTHERS, LIMITED, Claimant  
of the Tug "Kolo", her boats, en-  
gines, machinery, tackle, etc.,

*Appellant,*

VS.

JOHN CHO,

*Appellee.*

**Appeal from the United States District Court  
for the Territory of Hawaii.**

**REPLY BRIEF FOR APPELLANT.**

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**REPLY BRIEF FOR APPELLANT.**

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**ARGUMENT.**

1. A LIBELANT IN REM MAY NOT BE MAINTAINED IN ADMIRALTY AGAINST A TUG ON A CAUSE OF ACTION SOUNDING IN TORT ARISING OUT OF A TOWAGE AGREEMENT ENTERED INTO BY THE MASTER OF THE TUG WITHOUT THE AUTHORITY OF THE OWNER OF THE TUG, WHICH LACK OF AUTHORITY WAS KNOWN, OR SHOULD HAVE BEEN KNOWN, BY THE LIBELANT, OWNER OF THE TOW.

It is the position of the appellee that a vessel is liable *in rem* for maritime torts of negligent towage irrespective of the authority of the crew of the tug to engage in a towage operation (Brief of Appellee,

pp. 25-32). The appellee bases this conclusion upon the general admiralty principle, conceded by the appellant, that *in rem* liability normally attaches for torts committed by a vessel. Appellee's attempt to apply this doctrine to a towage case where the towee knew or should have known of the lack of authority of the tug master to undertake the tow is supported neither by admiralty cases, authors on the subject, nor by any other authority. The tug cases cited by him do not deal with the problem and furnish no basis for the extension of the application of the animistic doctrine<sup>1</sup> of *in rem* liability to cases where the towee voluntarily enters into a towage relationship knowing or reasonably put on notice of the lack of authority in the tug master to undertake the tow. *The Bulley*<sup>2</sup> involved tugs but no towage and the *John G. Stevens*<sup>3</sup> involved a collision of a tow but raised no question of the tug master's authority to enter into the towage relationship. The principle of *The Syracuse*<sup>4</sup> that a tug is liable for negligence even though the towage contract is at the tow's risk and the ruling of *The Temple Emery*<sup>5</sup> that a tug is liable for its negligence even though there is no towage contract does not

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<sup>1</sup>Errata in the opening brief of the appellant appear in footnotes 4 and 5 on page 20, the proper citations being:

4. Primitive Notions in Modern Law, 10 Am. L. Rev. 422, 432, et seq., The Common Law, 26-30.

5. Judge Harrington Putnam, 17 Am. L. Rev. 1, "The Liability of Shipowners for Masters' Faults".

<sup>2</sup>138 Fed. 170.

<sup>3</sup>170 U. S. 113.

<sup>4</sup>12 Wall. (79 U. S.) 167.

<sup>5</sup>122 Fed. 180.

deal with the basic problem or furnish any criteria for its solution.

The question is not whether there was or was not a towage contract but rather whether a tug is liable for the torts of its master arising out of a towage relationship where the towee voluntarily entered into the relationship knowing or put on notice that the tug master had no authority so to do.

The other citations of the appellee are similarly not in point. In *Rice v. The Marion A. C. Meseck*<sup>6</sup> a tug was held liable when its master following the directions of a harbor master standing on the tow caused the tow to be docked in a negligent fashion. No question of the authority of the master was raised.

*King v. Red Star Towing & Transportation Co.*<sup>7</sup> is cited by appellee for the proposition that a vessel taken in tow without charge can nevertheless hold the tug for its master's negligence. This principle is not the holding of the case but only *dicta* therein, and neither the case nor this excerpt establishes that a vessel is liable for its negligent towage irrespective of the authority of the crew to engage in the towage operation.

The appellee contends that the cases of *R. F. Cahill*,<sup>8</sup> *The Andrew J. White*,<sup>9</sup> and *The Oceanica*<sup>10</sup> re-

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<sup>6</sup>148 F. (2d) 522.

<sup>7</sup>48 F. (2d) 633.

<sup>8</sup>Fed. Cas. No. 11,735.

<sup>9</sup>108 Fed. 685.

<sup>10</sup>170 Fed. 893.

lied upon by the appellant are contrary to "the great weight of the American admiralty authority".<sup>11</sup>

No cases are cited by the appellee however which have reversed or even criticised these decisions. On the contrary, the three cited cases are obviously the only American decisions on the problem and constitute the American admiralty authority on this point.

Assuming the statement of the appellee that "the Federal Maritime Lien Act instead of limiting maritime liens, greatly increased the number of occasions when they would arise \* \* \*"<sup>12</sup> to be a correct statement, nevertheless this act limited liens *in rem* in favor of a ship supplier so that if the supplier knew or by reasonable diligence could have ascertained that the person ordering the supplies, purportedly on behalf of the ship, was without authority so to do, then no lien could arise.<sup>13</sup>

The appellee's statement that the appellant's view would "clearly require an existing, valid towage contract as a prerequisite to recovery for towage \* \* \*"<sup>14</sup> is not quite accurate. The position of the appellant is that if the owner of the tow knows the master of the tug has no authority to undertake the tow, the tug cannot be liable if the tow is nevertheless undertaken. If the knowledge of this lack of authority can be imputed to the tow owner, there can be no liability on the part of the tug. But if there is authority on the

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<sup>11</sup>Brief of Appellee, p. 31.

<sup>12</sup>Brief of Appellee, p. 32.

<sup>13</sup>46 U.S.C., Sec. 973.

<sup>14</sup>Brief of Appellee, p. 34.

part of the tug master or even if there is no such authority but the owner of the tow is ignorant of that fact, then the tug may be liable for its negligence in undertaking the tow, irrespective as to whether there was or was not a towage contract.

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2. **THE CUTTING OF A TOW LINE BY A TUG MASTER DOES NOT CONSTITUTE NEGLIGENCE AS A MATTER OF LAW, UNDER CIRCUMSTANCES WHERE THE TOWED VESSEL IS RAPIDLY SINKING, APPEARS TO BE ON THE VERGE OF COMPLETELY SUBMERGING, WHERE ONLY ITS BOW PROJECTS ABOVE THE WATER, AND WHERE THE QUESTION AS TO WHETHER IT WILL SINK DEPENDS UPON THE AMOUNT OF BUOYANCY IN ITS WOODEN STRUCTURE, THE SAFETY OF THE CREWMEN OF THE TOW AND THE TUG WOULD BE JEOPARDIZED BY A SUDDEN FOUNDERING OF THE TOW, AND WHERE THE NEAREST POINT OF LAND IS SOME EIGHT TO TEN MILES AWAY.**

It is the position of the appellee (Br. p. 10) that the standards of reviewability of findings of fact in admiralty are similar to those established in the Federal Rules of Civil Procedure for the review of findings of a Court without a jury. "This is not an accurate statement as is evident by the language used by this Court in *Blake v. W. R. Chamberlin & Co.*, 176 F. (2d) 511, 512 (1949):

"The devolution of law through judicial decision has greatly lessened the difference upon appeal between the ordinary action and tort and the *de novo* idea in admiralty cases for compensation. In tort cases, in the absence of reversible error, the judgment will be affirmed if it is supported by substantial evidence and the reviewing court

cannot say that, viewing the whole case, an injustice has been done. *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746. In admiralty strong effect will be accorded the conclusion of the court from substantial evidence given by witnesses in court and weight will be accorded the Court's conclusion where part of the evidence is by witnesses in court and part by depositions. \* \* \*

It is submitted that this constitutes the proper rule for the review of the instant case.

Having adopted an inaccurate criterion of reviewability, the appellee then goes on and attempts to establish that the findings of the trial Court are supported by evidence and, therefore, are not "clearly erroneous".

Among the findings so contended by the appellee to be supported by evidence is Finding No. 7, Appellee's Brief p. 11). This contention is erroneous. That finding<sup>15</sup> states that, due to his inexperience, the tug master cut the line despite the advice of an experienced crewman that the tow would not sink and that the tow line should not be cut. [This is not the substance of the testimony of the crewman as appears from the record.<sup>16</sup>

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<sup>15</sup>R. 26, Finding No. (7).

<sup>16</sup>The testimony of the crewman is:

"A. \* \* \* I told Joe (tug master) more better not cut, it afloat yet \* \* \*

Q. Why did you tell Joe not to cut the line?

A. I tell him more better no cut; she no sink, I think; it floating, the boat." (R. 149-150.)

The witness failed to qualify as an expert.

It is also said that this finding is supported by the testimony of Carl Holm that if he were as inexperienced "he might have done the same thing (R. 334), but knowing what he did, he would not have cut the line" (Appellee's Brief, p. 12). This is also an inaccurate summary of his testimony he also stating that he would have towed until he was absolutely sure she would submerge (R. 332).

The finding of the court that the sampan had sufficient buoyancy to remain afloat and could have been towed to Honolulu (Finding No. 8, R. 27) is said to be supported by the evidence of overhaul and periodic repairs, the evidence that sampan wood four years old would remain positively buoyant,<sup>17</sup> the testimony of experts that they knew of no instances where

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<sup>17</sup>The subsequent testimony of the expert Carl Holm with respect to the buoyancy of the sampan with the four year wood in its structure was apparently overlooked by the Court although the Court significantly enough felt this expert extremely well qualified, stating that "the Captain has given us the best insight into this problem that we have had. He certainly is an expert in his field, whereas the other man may be an expert, but I don't think he is quite as much of an expert as this man is." (R. 335.)

Holms' testimony on the buoyancy of the sampan is as follows:

"Q. Assuming that this sampan, which had no cargo, fuel tanks half full, and the other characteristics as given to you by Mr. Collins, assuming further that it had a crushed part three inches wide and a foot and a half long, but that that was pulling apart of the grain and opening of seams, rather than a hole, as expressively put by my brother, Mr. Collins, would you say that that sampan would sink?

A. I would say that from what I can see of the specifications of the ship, in regard to length and breadth and depth, and the weight factors in general involved in that type of sampan, that the buoyancy factor of the wood and the weight factor involved would lie very close together. It might be ten per cent in favor either way." (R. 324.)

Hawaiian sampans were lost through sinking,<sup>18</sup> testimony by one expert that such vessels do not normally sink;<sup>19</sup> testimony of another sampan owner of his vessel being safely towed in;<sup>20</sup> and testimony of the expert Holm of instances of sampans awash being towed to safety<sup>21</sup> (Appellee's Brief, p. 12).

It is submitted that, in the light of the entire record, this does not amount to the substantial evidence required by this Court to support a trial Court's conclusions in order that such conclusions be given strong effect here.

As has been previously pointed out, the appellee's approach that it is necessary for the appellant to show that the trial Court's findings were "clearly erroneous" to warrant a reversal is not a correct statement of the principles guiding this Court in the review of this case.

The appellee having thus endeavored to establish the factual support of the findings of the trial Court

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<sup>18</sup>Both, however, testified of instances where sampans had flooded, filled and had become completely submerged although subsequently salvaged (R. 201, 328-331).

<sup>19</sup>Although on cross-examination he admitted that he was familiar with one case where the vessel completely submerged (R. 201).

<sup>20</sup>The tow being in the lee of the Island of Oahu and not through unprotected water such as that found in Molokai Channel (R. 169).

<sup>21</sup>In one instance the witness did not know from whence it was towed or the nature of the accident causing the damage. In the second, the vessel was brought a very short distance to the shipyard, the passage being entirely within enclosed waters inside the reef; and in the third, the towage was successfully accomplished after the engine had been removed from the craft and she had otherwise been made ready for tow (R. 328-329).



proceeds to contend that the findings support a determination that the master of the tug was negligent (Appellee's Brief, pp. 14-21). An analysis of the appellee's brief as well as the record itself shows a lack of any evidence concerning the standard of skill, experience, or care that is or should be required of a tug master of a small tug in Hawaiian waters (except as hereinafter mentioned) or of the failure of compliance by the master of the tug "Kolo" with such standards. The evidence shows the knowledge of experts and the opinion of experts but does not show that a tug master is held to the standards of such knowledge or opinions.

The only evidence touching upon the skill or care to be expected of a tug captain of a class of that of the "Kolo" is contained in the statement of Captain Holm that "a small tug requires a small master, perhaps, and he couldn't expect to have a salvage expert at the wheel of a 60, 70 foot tug \* \* \*" "In commercial towing, why sometimes very hard to get experts at the price involved in towing sampans and other things" (R. 333).

It is submitted that the appellee seeks to impose upon the master of the tug "Kolo" the knowledge, skill and experience of technical experts in the field of salvage work. He seeks to demand that the tug master act "in the exercise of the reasonable discretion of experienced navigators" with knowledge of "such information as is current in the calling". There is no testimony of any other tug masters on the point. There is the testimony only of experts who do not oth-

erwise touch upon the knowledge or skill current among Hawaiian tug masters of small vessels.

Now because experts testified that the vessel might have been salvaged, although the possibility or probability of its sinking before reaching port is not excluded, it does not follow that the tug should be responsible because the tow was not safely brought into port. To so conclude would make the tug an insurer of the safety of the towed vessel, something not required as a matter of general towage law.

In addition the appellee would have this Court disregard the principle of *The Stirling Tomkins* and the *S. S. Bellatrix* cases, as well as the holding of this Court itself in *Allen & Robinson v. Inter-Island Steam Nav. Co.*, 34 F. (2d) 83, 86, that a tug master is not liable for mere errors of judgment in an emergency on the ground that there was not involved in the present instance an emergency situation (Appellee's Brief, pp. 14, 15). With the lives of the crewmen at stake because of the submergence of their towed vessel it is hard to see the merit of the appellee's contention. The testimony that these men were clinging to the submerged portion of the cabin, the whole of which was under water, as well as the entire vessel aft of the cabin, with merely the tip of the bow projecting out of the water at a 45 degree angle, would apparently justify a conclusion that the situation was an emergency one. But if the term "emergency" is objectionable it should be observed that the principle of these cases has been applied in "difficult situations" in *The*

*Stirling Tomkins* case at a "critical time" in the *Allen & Robinson* case. Clearly the principle is applicable to this case.

The appellee further urges that inaction on the part of the tug master at the time of the submergence of the tow would have resulted in no damage (Appellee's Brief, p. 16). Yet the testimony dealing with the then condition of the tow leads to the inevitable conclusion that action was required, and required quickly, in order that the lives of the crewmen on the towed vessel might be saved.

The appellee further cites as a principle of law that a "high degree of diligence to save a tow that has gone adrift" reposes on a tug (Appellee's Brief, p. 17). This statement constitutes not the decision but *dicta* in the case cited therefor<sup>22</sup>. In none of the cases which the appellee cites in furtherance of this principle was the tow apparently foundering. In one case of those cited the tug captain thought the tows were going down<sup>23</sup> but this view was apparently not shared by the crew members of the tow who did not signal to be taken off, as in the present case (R. 143), but left only after the tug captain had decided to abandon and had actually cut the tow line. The other cases all involved the abandonment of apparently sound and seaworthy tows because of the difficulties experienced in attempting to continue the tow under heavy weather. The lack of emergency in the cases submitted, weakens the ap-

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<sup>22</sup>*Atkinson v. Scully*, 246 Fed. 463 (1917).

<sup>23</sup>*Appeal of Cahill*, 124 Fed. 63.

plication of any principle such as that enunciated by the appellee to the case at bar.

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3. A TUG AND HER MASTER ARE NOT SOLELY RESPONSIBLE FOR THE LOSS OF AN UNSEAWORTHY TOW, KNOWN TO BE SUCH BY HER OWNER AT THE TIME THE TOW IS UNDERTAKEN, AND WHERE THE TOW IS INADEQUATELY EQUIPPED FOR THE VOYAGE AND WHERE HER CAPTAIN FAILED TO NOTIFY THE TUG THAT SHE WAS TAKING WATER IN EXCESS OF THE CAPACITY OF HER PUMPS UNTIL A BREAKDOWN OF THE PUMPS OCCURRED, AND WHERE HER CAPTAIN AFTER LEAVING THE VESSEL TOOK NO AFFIRMATIVE STEPS THEREAFTER TO SAVE HER.

It is apparently the position of the appellee that the tow had no obligation or responsibility with respect to notification of the tug that its pump was not keeping up with the water coming into the hull, and that it further had no obligation to be initially furnished with adequate pumping equipment. This is contrary to the principle of the cases cited in the appellant's brief, pages 36-40.

No authority is cited by the appellee for his position other than the case of *The Stirling Tomkins*,<sup>24</sup> a case involving a tug with a string of eight barges which failed to notify the barges of a curve in the river, as a result of which, in making a change of course, the barges were whipped into shallow water and were damaged. This case holding that the tug had the responsibility of setting up an adequate sig-

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<sup>24</sup>56 F. (2d) 740.

naling system to warn the tows of such conditions is hardly authority for the proposition that the appellee urges. It certainly does not refute or gainsay the principle of the cases relied upon by the appellant.

The fact is that the pumping facilities on the tow were inadequate. The pump was not properly protected from the water. The crew men of the tow had the duty of notifying the tug that water was being shipped aboard faster than the pump could handle it. The members of the crew of the tow failed to notify the tug of this condition until the situation became serious, the pump became inoperative, and the vessels were approximately mid-way in the channel between the islands.

It is submitted that this negligence clearly contributed to the loss of the ship, and along with the other factors set out in the brief of the appellant, would require a halving of the damages if the tug should be found to be at all at fault in connection with the loss of the tow.

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### CONCLUSION.

For the reasons set forth in the appellant's opening brief as well as those herein contained it is respectfully submitted:

1. That a libel *in rem* may not be maintained against the tug "Kolo" on the facts as they appear in the record of this case;

2. That the record herein shows that the loss of the sampan "Tenyo Maru" was not due to the fault of the tug "Kolo";

3. That the loss of the "Tenyo Maru" is attributable to her unseaworthy condition, inadequate equipment and failure of those aboard her to take adequate affirmative steps to notify the tug "Kolo" of her condition until she was *in extremis*, and that, if any fault is attributable to the tug "Kolo" in connection with the loss of the "Tenyo Maru", damages should be halved between the two vessels.

Dated, Honolulu, T. H., this 1st day of March, 1950.

SMITH, WILD, BEEBE & CADES,

By J. EDWARD COLLINS,

*Proctors for Appellant.*

No. 12,367

IN THE

United States Court of Appeals  
For the Ninth Circuit

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NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership  
doing business under the firm name  
and style of North Star Mining Com-  
pany,

*Appellants,*

VS.

VUKA RADOVICH STEPOVICH, Executrix  
of the Estate of Mike Stepovich,  
Deceased,

*Appellee.*

BRIEF FOR APPELLANTS.

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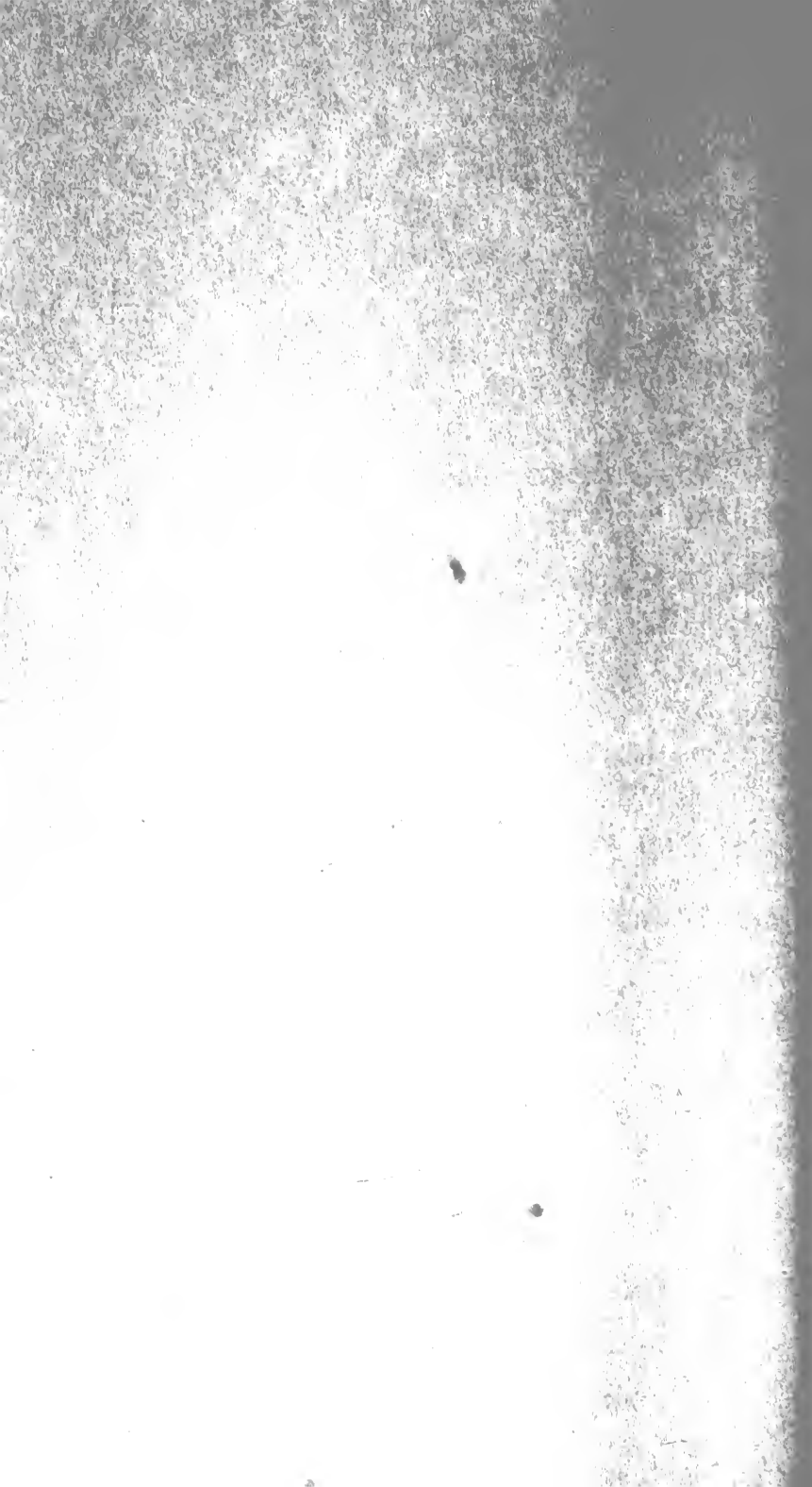
WARREN A. TAYLOR,

Fairbanks, Alaska,

*Attorney for Appellants.*

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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership  
doing business under the firm name  
and style of North Star Mining Com-  
pany,

*Appellants,*

vs.

VUKA RADOVICH STEPOVICH, Executrix  
of the Estate of Mike Stepovich,  
Deceased,

*Appellee.*

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**BRIEF FOR APPELLANTS.**

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**I.**

**JURISDICTION OF DISTRICT AND APPELLATE COURTS.**

This action was commenced by appellants in the District Court for the Territory of Alaska, Fourth Judicial Division. On the 20th day of October, 1947, appellants, lessees of a certain mining claim located within the said Fourth Judicial Division, filed a Second Amended Complaint (T.R. 2) whereby they sought to recover damages from their deceased les-

sor's estate for certain alleged conduct on the part of the said lessor. Issues were joined on Appellants' Reply (T.R. 19) to Appellee's Amended Answer (T. R. 15) to said Second Amended Complaint.

A jury trial was had on the issues so joined and, at the close of appellants' evidence, a verdict for appellee was directed by the trial Court. (T.R. 275.) Judgment for appellee and against appellants was entered accordingly on the 12th day of January, 1949. Notice of Appeal was filed on the 6th day of April, 1949. On the 9th day of April, 1949, the said District Court allowed the Appeal (T.R. 26) but subsequently set aside said Appeal on the 6th day of May, 1949. Upon mandate of this Court (T.R. 31) the said District Court reinstated the Appeal (T.R. 34) on the 12th day of September, 1949, and said Appeal was duly perfected and lodged in this Court within the time allowed by law.

The right of Appeal from the said District Court to this Court is provided for by 28 U.S.C. Sec. 1291.

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## II.

### STATEMENT OF CASE.

Appellants, as lessees of a placer mining claim, filed a complaint in the District Court whereby they sought to recover damages from the estate of their deceased lessor. The basic matters alleged in that complaint were: (1) the capacity of the appellees; (2) the demise of the lessor and the appointment of

the executrix, now appellee; (3) the execution of the lease and its incorporation in the complaint; (4) an entry by appellants upon the leasehold and a compliance with the terms of the lease; (5) a wrongful attachment by the lessor with instructions to the U.S. Marshal, pursuant thereto, to oust and eject the appellants and a resultant ouster and ejectment, with a custodian placed in charge of the demised premises preventing re-entry; (6) a voluntary nonsuit by decedent lessor after the arrival of winter had made a resumption of mining operations impossible; (7) as damages, the appropriation by decedent of \$20,000 worth of gold contained in a dump and sluice boxes; expenditures in the amount of \$6,791.29 and expected profits for the duration of the lease of \$100,000; (8) a prayer for damage in the amount of \$106,791.29.

In her answer, appellee, in legal effect, admitted the capacity to sue of Nick Kupoff and James Zukoev but denied an assignment making the remainder of appellants parties in interest; admitted the death of the lessor and the appointment of appellee as executrix; admitted the execution of the lease; denied entry and compliance with the terms of the lease; denied the wrongful attachment and the ouster and ejectment pursuant thereto; admitted the entry of a nonsuit by the lessor but denied the impossibility of resuming mining operations; denied all of the allegations with respect to damages. For an affirmative defense, the appellee pleaded the tolling of the Statute of Limitations and a failure to file a claim with the estate of the decedent as required by law.

These affirmative matters were traversed by appellants' reply.

The issues having thus been joined, appellants introduced their evidence, at the close of which, appellee moved for a directed verdict (T.R. 249-257) based on the following grounds: (1) That the action was *ex delicto* in which case the Statute of Limitations had run; (2) That there was no evidence of damages; (3) That a voluntary nonsuit would not, in itself, make an attachment wrongful; (4) That no claim was filed with the decedent's estate for this particular cause of action; (5) and that there was a failure of evidence of ejectment. The trial judge sustained the motion upon the following grounds (T. R. 272-274): (1) That the action was in tort and that, the Statute of Limitations had therefore run; (2) that no claim *of the nature* on which this action had been based, was filed with the decedent's estate; (3) that there was no evidence of ejectment; (4) that, since the attachment as shown by the evidence was only of personal property, there could not have been an ejectment; (5) that there was no showing of authority that Stepovich ever directed the Marshal to eject anyone; (6) and that there was a failure of evidence as to damages.

Appellants moved for a new trial (T.R. 21) saving as questions for review the correctness of the trial Court's action in sustaining appellee's motion for a directed verdict and the propriety of evidentiary rulings made by the trial Court. These matters were assigned as error in this Court. (T.R. 279-281.)



## III.

## STATEMENT AS TO ARRANGEMENT OF BRIEF.

The particular errors made in evidentiary rulings will be considered in the body of this brief, where relevant, in the treatment of the trial Court's ruling on appellee's motion for a directed verdict. These rulings are so closely connected and interwoven with the matters considered on the motion as to destroy whatever continuity this brief may possess by treating them separately. For the purposes of systematic arrangement, the various bases of the trial Court's ruling on appellee's motion will be treated in the same order as made by the trial Court. For convenience and to avoid repetition, rules operating as guideposts for appellate treatment of an appeal from a directed verdict will be discussed first.

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## IV.

APPELLATE TREATMENT OF APPEAL FROM  
DIRECTED VERDICT.

The rule adhered to by this Court in reviewing the evidence on orders denying or granting a motion for a directed verdict is set out in *Indemnity Insurance Co. of North America v. Atchison, T. & S. F. Ry. Co.*, 85 F. (2d) 438, 439, following the rule as expressed in *Lumbr v. United States*, 290 U.S. 551, 553, 54 S. Ct. 272, 78 L. Ed. 493:

“ ‘The question presented is whether there is any evidence upon which a verdict for petitioner might properly be found. And for its decision,

we assume as established all the facts that the evidence supporting petitioner's claim reasonably tend to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts. *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S. Ct. 231.' "

Accord:

*Ojus Mining Co. v. Manufacturer's Trust Co.*,  
82 F. (2d) 174.

Before the decision of the Supreme Court in the *Lumbara* case, *supra*, the rule of this Court was expressed in terms of assuming the truth of all evidence sustaining plaintiff's right to recover, including inferences of fact deducible therefrom. *Summers v. Denver Tramway Corporation*, 43 F. (2d) 286. The present rule is, perhaps, broader, in that it treats as true all facts which the evidence tends to prove and the inferences fairly deducible from those facts.

An additional consideration important in appellate treatment of appeals from directed verdicts is that the Court will assume that a case was made for the jury on an issue, the insufficiency of evidence on which was not assigned by the trial Court in support of its ruling. *Pope v. Utah Idaho Cent. R. Co.*, 54 F. (2d) 575.

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## V.

### TORT OR CONTRACT.

The first ground stated by the trial Court for its direction of a verdict was that appellants' complaint

stated a cause of action in tort and not contract and that the period for bringing a tort action had expired at the time this action was commenced. As far as we can ascertain from argument of appellee's counsel in support of the motion (T.R. 249-257) the tort action thought to have been alleged was for a wrongful attachment, although counsel may have been arguing that it was for a tortious eviction or for both. Indeed, counsel's supporting argument, though showing an admirable familiarity with conventional tort phraseology, stops well short of any deep-rooted analysis of matters alleged in appellants' complaint. Nor does the trial judge clarify the issue by advancing any reasons in support of his finding that the action was based on tort. (T.R. 272.)

Any considered analysis of appellants' complaint, it is submitted, will reveal that it states a cause of action in contract as distinguished from an action in tort—an action brought for breach of a lease rather than for tortious eviction or wrongful attachment. Before commencing our construction of the complaint, it would be well to review briefly the authorities which we deem pertinent.

It is a fundamental principle of law that where the same conduct constitutes a tort and also a breach of contract, the party aggrieved by that conduct may make an election of which of the remedies he wishes to pursue. *Jones v. Kelly*, 208 Cal. 251, 280 P. 942; *Matthys v. Donelson*, 179 Iowa 111, 160 N.W. 944. Although, strictly speaking, there can be no election where one of the remedies is unenforceable, still, this

has been the language employed by the Courts. *Matthys v. Donelson*, supra. The problem then resolves itself into a determination of which remedy complainant, in fact, has pursued in a given case.

To arrive at a judicial determination of this matter in doubtful cases, the Appellate Courts have laid down certain presumptions and rules, most of which have been designed to sustain the jurisdiction of the Court and to afford the pleader relief. Jurisdiction is here used in the sense of the power of the Court to grant relief rather than in the sense of its power to take cognizance of the subject matter of the action or to obtain control over the parties to the controversy.

To illustrate, it is stated as a general rule that where it is doubtful whether a pleading states a cause of action in tort or in contract, it will ordinarily be construed as the latter. *Nathan v. Locke*, 108 Cal. App. 158, 287 P. 550; *affd. per curiam*, 108 Cal. App. 158, 291 P. 286; *Douglas v. Loftus*, 85 Kan. 720, 119 P. 74. This rule has been given the status of a presumption in *Southern Pacific R. Co. v. Gonzales*, 48 Ariz. 260, 61 P. (2d) 377, citing *Anderson v. Thude*, 42 Ariz. 271, 25 P. (2d) 272, 273:

“It is the rule that if the complaint may be construed either as one in tort or one on contract, that it will be presumed to be the latter.”

The rule is stated in still another way in *Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329, 332:

“\* \* \* The generally accepted rule is that, in doubtful cases, every intendment is in favor of regarding the action as *ex contractu*.”

In *Nathan v. Locke*, *supra*, the rule is stated to be based on the factor that liability in contract is less extensive than in tort. An examination of the fact-situation in that case clearly reveals that the rule was employed merely as a device to reach a desired result—the granting of relief to the pleader. The action in that case was brought by a judgment-debtor to recover contribution from his co-defendants. Under California law, the remedy of contribution would only be available if the action on which the judgment was based were *ex contractu*. The Appellate Court held the plaintiff entitled to contribution. For this result, the Court applied the above-stated rule as a reason for its holding, even though the basis of that rule could have no application to the fact-situation then confronting the Court.

In *Matthys v. Donelson*, *supra*, the Iowa Court, adhering to a rule antithetical to that employed by the California Court in *Nathan v. Locke*, reached the same result as the California Court where an application of the Iowa rule under the circumstances would have denied relief to the pleader. Said the Iowa Court, p. 945:

“The situation is such in many cases that an action as of tort or an action as for breach of contract may be brought by the same party upon the same state of facts. Cooley on Torts (3d Ed.) 56. Thus actions for the same loss may be main-

tained against a common carrier of goods or messages ex contractu or ex delicto, and save where the bar of the statute of limitations is involved, if there be doubt, the cause of action is usually construed as sounding in tort. But where one would be barred by the statute of limitations and the other would not, the latter will be presumed to have been intended, for it is not likely anyone would choose to prosecute an action ex delicto which would be barred when the same relief was available in an action ex contractu.”

The case of *Southern Pacific R. Co. of Mexico v. Gonzales*, supra, serves further to illustrate the extent to which a Court will go to afford relief to the pleader. In that case, the question involved was whether or not plaintiff had stated a cause of action for breach of the defendant carrier's common law duty to afford safe carriage for goods or a breach of its contractual duty to afford the same. If the former were true, the statute of limitations would operate as a bar to relief; if the latter, plaintiff was entitled to relief. That portion of the opinion pertinent to this inquiry appears at pages 386 and 387 of the Pacific Reporter. After stating, p. 387, that paragraph 5 of plaintiff's complaint had carefully set out an agreement upon consideration obligating the defendant carrier to safely transport the plaintiff's goods, the Court noted that paragraph 7 of the complaint consisted of allegations of affirmative and negative non-feasance, “two things which are ordinarily presumed to give rise to an action ex delicto”.

Paragraph 7 as set out by the Court does not correlate the tortious allegations with the contract as alleged in paragraph 5. Yet the Court found that plaintiff had stated a cause of action for breach of an *implied contract* to safely carry the plaintiff's goods. To arrive at this result, the Court examined the *only contract introduced in evidence*, the bill of lading, after noting that plaintiff did not "see fit to set forth all or part of the contract on which he claims to rely *haec-verba*". After observing its adherence to the rule that if an action is on the contract, allegations of its breach through negligence of the defendant will not transform it into a cause of action in tort, the Court made the necessary connection between the tortious allegations in paragraph 7 and the contract alleged in paragraph 5 by comparing those allegations with the conditions of non-responsibility appearing in the Bill of Lading, it being the opinion of the Court that plaintiff's pleading recognized the necessity of negating non-responsibility.

The introductory language employed by the Court in approaching this problem is also illuminating, p. 387:

"Let us then examine the complaint to determine whether it appears clearly that it is *ex delicto*, or whether the question is doubtful."

This language and the reasoning of the Court clearly indicates that every intendment will be resolved in favor of the pleader and in construction of the pleading as stating a cause of action in contract where a tort action arising out of the same basic fact-situa-

tion would be barred by the statute of limitations. Accord: *Matthys v. Donelson*, supra.

The case also stands for certain other propositions important to the decision of the matter now confronting this Court. It is authority for the rule that where a complaint states a cause of action in contract, the fact that it alleges that the breach occurred through tortious conduct on the part of the defendant will not transform the contract action into one in tort. Accord: *Timmons v. Williams Wood Products Corp.* supra; *Ketcham v. Miller*, 104 Ohio St. 372, 163 N.E. 145. It stands for the further proposition that in cases of doubt, the averment of a promise or consideration or usual incident of contract, are significant considerations in giving character to an action as *ex contractu*. Accord: *Timmons v. Williams Wood Products Corp.*, supra.

There is, however, one significant aspect to the *Gonzales* case, supra, which requires particular emphasis—that being the procedure employed by the Arizona Court of inquiring into the evidence produced at the trial of the case where an examination of the complaint did not remove, from the Court's mind, doubt as to the nature of the action set out in the complaint. Although as a general rule, the nature of the action must be determined solely from the pleadings (1 *U.J.S. Actions*, Sec. 46, p. 1100), still it is submitted that the approach of the Arizona Court where the matter still remained in doubt after an examination of the pleadings, is a wise and judicious procedure. It is not the policy of the law today



to penalize the litigant because of inept pleading on the part of his counsel. The Federal Rules of Civil Procedure exemplify the trend of American Jurisprudence today—a trend away from the pitfalls of technical pleading and strict procedure. A rule which allows the pleader to present his evidence on the theory that he has stated a cause of action in contract and does not permit one to resort to that evidence to clarify the issue where the pleadings leave the matter in doubt is not a rule designed to obtain justice in a given case, but is a rule without foundation in law or reason, the application of which can only work injustice.

There are still other guideposts to a judicial determination of the nature of a cause of action in addition to those heretofore set out. The judicial approach has been in terms of ascertaining the “gravamen” of the action.

Gravamen is defined by *Black's Law Dictionary* (3rd Ed. 1933), p. 856, as follows:

“Gravamen—the burden or gist of a charge; the grievance or injury specially complained of.”

And this is the sense in which that term has been employed by the Courts. *Nathan v. Locke*, supra; *Ketcham v. Miller*, supra. Thus in *Nathan v. Locke*, the California Court, noting that the whole theory of plaintiff's complaint for eviction was based on anticipated profits which he would have recovered had he been allowed to remain in peaceable and undisturbed possession, held that plaintiff had stated

a cause of action for an eviction *ex contractu* rather than *ex delicto*. *Ketcham v. Miller* is to the same effect.

*Ketcham v. Miller*, *supra*, is also significant in that it clarifies the effect of employing tortious phraseology in a complaint that states an action in contract. At p. 146 of the opinion, the Court says:

“The amended petition alleges title of the property to be in the plaintiff in error; alleges the authorization of the attorney-in-fact to execute a lease; alleges the execution of the lease to defendants in error; sets out the lease and makes it a part of the petition; alleges the value of the lease to the defendants in error; alleges the breach by the plaintiff in error in an unlawful, forcible, wilful, wanton and malicious manner, and denominates it a breach; alleges that plaintiff in error ‘has ever since held and now does so unlawfully, wilfully, wantonly and maliciously keep and hold said premises, and will continue to do so; and has prevented and does now and will prevent plaintiffs from using and enjoying the same, and from making and acquiring the profits and value of said lease, and from obtaining the said extension thereof, as plaintiffs desire to do, to the damage of these plaintiffs in the sum of \$150,000.00.’

“What is the gravamen of this complaint? Of what are the defendants in error complaining? They do not complain of damage to or destruction of the building, the subject matter of the lease, their property for the term; they do not claim of any injury to their effects; but they do aver that the value of the lease to them is \$150,-

000.00, that they have been unlawfully, forcibly, wilfully, wantonly, maliciously, and without their consent deprived of the benefits thereof, and ask judgment for damages in that sum.

“It is true that the petition characterizes the breach as having been committed \* \* \* ‘unlawfully, forcibly, wrongly, wantonly, maliciously, and without consent’ of the defendants in error. What do these words add to the averment of a breach? Generally speaking, breaches are unlawful and ejectments are forcible; most breaches are wilful and perhaps but few are ‘wanton’ and ‘malicious’; but do the words ‘wanton’ and ‘malicious’ transform an exact averment of a breach of contract into an averment of the commission of a tort; or do they not, in the connection here used, charge the plaintiff in error with the commission of a breach, and attempt to emphasize it by averring that it was done in utter disregard of the rights of the defendant in error and an evil and wicked purpose?

“While the facts in this case might well have justified a pleading charging a tort, we are unable from the amended petition itself to reach any other conclusion than that the gravamen of the complaint is the breach of the contract, and that the words ‘wilfully, wantonly and maliciously’ add nothing thereto and must have been intended by the pleader to characterize the motive and purpose of the perpetrator of the breach  
\* \* \* .”

The gravamen of the complaint, as indicated by the above language, is to be determined by the nature of the grievance rather than the form of the plead-

ings (Accord: *Nathan v. Locke*, supra), and the nature of the grievance is to be determined by a consideration of the pleading construed as a whole. (Accord: *Douglas v. Loftus*, supra.)

In light of the foregoing authorities we now proceed to examine appellants' complaint in the instant case.

*The lease itself is attached to and incorporated in the complaint* (T.R. 3, paragraph III of Appellants' Second Amended Complaint), a pleading practice hardly consonant with the theory advanced by the trial Court that the action was in tort. *Furthermore, there are allegations of entry under and compliance with the terms of the lease*—allegations necessary to recovery in contract but not in tort—which clearly indicate that it is a breach of the lease for which recovery is sought. (T.R. 3, 4, paragraph IV of Appellants' Second Amended Complaint.)

Then, it is alleged; that “notwithstanding the fact that all accounts had been fully settled” between the appellants and the decedent lessor, that decedent did “wrongfully and unlawfully” cause a writ of attachment to be issued by the District Court commanding the United States Marshal to attach certain property on the leased ground; and did “unlawfully, wrongfully and maliciously, abuse the process of this Court by directing and instructing the United States Marshal to seize all of the said property of plaintiffs and oust and eject the said plaintiffs from the said demised premises”. (T.R. 4, 5, paragraph V of Appellants' Second Amended Complaint.) It is submitted

that these allegations are not inconsistent with an action in contract when *the complaint is considered in its entirety and undue emphasis is not placed on the language employed or on this particular paragraph of the complaint isolated from its context. The tortious phraseology employed serves only to characterize the conduct of decedent and to lay a foundation of intent to dispossess contrary to the terms of the lease.* Thus, was the allegation included that these acts were done “notwithstanding the fact that all accounts had been fully settled”. Furthermore, appellants will attempt to demonstrate in a later portion of this brief that, even assuming the “legal validity” of the attachment, the circumstances surrounding its procurement and levy may make it a breach of the contract existing between the parties. It is in this latter context that conduct may be tagged with tort labels and make sense though not employed to state, nor stating a cause of action in tort. Thus, where an action in contract alleges matters sounding in tort, these matters are treated as surplusage and do not alter the essential nature of the action.

Appellants then proceed to set out their ouster and ejectment pursuant to the writ and the instructions of the decedent and the placing of a custodian in charge of the premises and a prevention of re-entry and a continuance of work under the lease. (T.R. 5, paragraph VI of Appellants' Second Amended Complaint.) Next, appellants allege the entry of a voluntary nonsuit by decedent on the 24th day of November, 1942, after winter had set in making a resump-

tion of mining operations impossible. (T.R. 5, paragraph VII of Appellants' Second Amended Complaint.) These allegations make it clear that the gist or gravamen of appellants' complaint was grounded on the lease and the conduct of decedent in preventing the enjoyment of the leasehold for the balance of its term; that is, that the eviction was a violation of the implied covenant of quiet enjoyment. The allegations of damages and the prayer for relief further substantiate this construction of appellants' complaint. Appellants seek to recover as damages their share of the profits "under the terms of said lease" which they would have recovered during the remainder of their term had they not been ousted by decedent. Further, the acts and doings of decedent, with their tort tags, were done with "the intent of ousting and ejecting the plaintiffs from said mining ground and preventing them from mining under said lease, and to damage plaintiffs thereby". (T.R. 5, 6 and 7, paragraphs VIII, IX and X of Appellants' Second Amended Complaint.) Surely, if we were able to forget for a moment our legal education and apply common sense to the facts as pleaded, we could quickly ascertain of what appellants were complaining. They were complaining, purely and simply, that they had entered into a lease with the decedent according to which they were to be allowed to mine the ground for a certain period of time; and that the decedent, in violation of this lease, had caused their property to be attached by the Marshal, a guard to be placed in charge of the claim, and has caused them to be excluded from the claim preventing them from min-

ing it for the balance of the term even though they had in no way been in fault. This was the gist, the gravamen, the true cause of their complaint, which is easily discernible when the legal verbiage has been weeded out and the clear vision of reason employed to read the complaint.

In conclusion, it is to be noted that appellants' prayer for relief is limited to compensatory damages. Had counsel wished to state a cause of action in tort, surely he would have asked for punitive damages in view of the nature of the conduct alleged to have been indulged in by the decedent.

Furthermore, an examination of what appellants proved and sought to prove as considered in subsequent sections of this brief dealing with the question of eviction and damages will clearly indicate that counsel thought that he had stated a cause of action in contract and was seeking to prove the same. See *Gonzales* case, *supra*.

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## VI.

### **FAILURE TO FILE CLAIM WITH ESTATE OF DECEDENT.**

The second reason advanced by the trial Court to sustain appellee's motion for a directed verdict was that appellee had failed to file the claim sued on with the estate of the decedent as required by law. If this Court sustains appellants' view that appellants proceeded in contract and not tort, then this reason is obviated as a claim for breach of the lease was filed

with the estate and admitted in evidence at the trial of this case. (T.R. 112.)

It is significant to note that the measure of relief asked for by the appellants in their claim filed with the estate is identical in amount with that requested by their prayer in the instant case—indicative of appellants' belief that they were pursuing a contractual remedy.

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## VII.

### FAILURE OF EVIDENCE OF EVICTION.

The third reason advanced by the trial Court to sustain appellee's motion was failure of evidence of ejectment. The trial judge apparently entertained the theory that there could be no ejectment where the Marshal had been directed by the decedent to attach only the personal property of the appellants and that there was no showing that the deceased had ever directed the Marshal to eject the appellants. (T.R. 272, 273.) The fallacy of the trial judge's conclusions, it is submitted, lay in his failure to consider or realize what evidence of eviction would be sufficient to make out a *prima facie* case where the gravamen of the action was for breach of the lease and not for tort. Having decided that the action was in tort, it was unnecessary for the trial judge to determine the sufficiency of the evidence to establish a commission of that tort; and, having proceeded, apparently, to do just that, his reasoning can be of little assistance in a solution of the problem at hand.



## A.

**Introductory statement.**

It is submitted that the evidence presented by appellants at the trial of this case made out a *prima facie* case of constructive, if not actual eviction, which entitled appellants to damages as a breach of the implied covenant of quiet possession in the absence of countervailing evidence by the appellee. However, if it is determined by this Court that the record is insufficient in that respect, then it is contended that erroneous rulings of the trial Court on evidentiary matters were prejudicial to appellants in that they were prevented from making out a *prima facie* case.

We will proceed, first, by summarizing that evidence of appellants on this point which managed to sift through the constant barrage of objections interposed by appellee's counsel—said objections adding little to the judicial function of fact-finding and considerably enhancing the cost of printing the transcript. We will then discuss the substantive aspects of constructive eviction and their applicability to the facts as established. Finally, we will discuss those evidentiary rulings which are deemed prejudicial to the appellants' development of a case of actual or constructive eviction.

## B.

**Case made out by admitted evidence.**

On the 13th day of February, 1942, a mining lease was executed by and between the decedent, Mike Stepovich, as lessor, and one Paul Drazenovich, ap-

pellant James Zukoev and appellant Nick Kupoff, as lessees, the term of said lease to expire on the 1st day of November, 1943. The consideration for this lease running to the lessor was one-third of the amount of precious minerals recovered from each cleanup. (Original lease admitted in evidence as plaintiff's Exhibit "A". (T.R. 38.) The lease is set out in full on pp. 8 to 14 of the T.R.) On the 6th day of August, 1942, Drazenovich sold his interest in the lease to the appellants herein. (Exhibit "E", T.R. 95 to 97.)

The appellants Kupoff, Zukoev and Drazenovich entered into possession of their leasehold interest on the 18th day of February, 1942. (T.R. 39.) After spending four to five weeks removing ice from a shaft and an old drift (tunnel), the appellants commenced exploratory drifting in an effort to locate the pay streak. After commencement of this exploratory work, the lessor visited the mine site "sometimes every day, sometimes every other day". On these occasions he would obtain and pan dirt from the new drift. (T.R. 41 to 44.) "Around the first part of August", a rich pay streak was located by the appellants. (T.R. 48.)

On the 21st day of August, 1942, the lessor commenced an action in the District Court against the lessees and a writ of attachment was issued by the clerk of that Court on the same day, commanding the United States Marshal to attach and safely keep all of defendants' property not exempt from execution and sufficient to satisfy the debt sued on and costs

and disbursements. (Plaintiff's Exhibit "D", certified copy of writ of attachment, T.R. 79.) The writ recites that the necessary affidavit and undertaking as required by law had been filed.

The complaint in said action sets out five separate causes. The first is for rental due on a certain RD 7 caterpillar from the 20th day of February, 1942 to the 15th day of April, 1942, in the amount of \$2,700.00. The last four causes are based on assignments to the lessor of debts due and owing from the appellants to third parties, each of these debts having been assigned to the lessor on the 20th day of August, 1942. A summons was issued on this complaint on the 21st day of August, 1942, and returned served on the appellants Kupoff and Zukoev on the 24th day of August, 1942. (Plaintiff's Exhibit "C", certified copies of the complaint, summons and Marshal's return. (T.R. 62 to 71).)

Plaintiff's Exhibit "B" (T.R. 52), which is a statement of the account between the lessor and the appellants as of August 8, 1942, is acknowledged paid in full by the lessor. One of the items mentioned therein is "Caterpillar rent under lease—July payment—\$250.00". It appears from the evidence that this was the only caterpillar tractor concerning which the parties had any agreement or chattel lease. (T.R. 100-101.)

Plaintiff's Exhibit "I", (1), (2), (3) and (4) (T. R. 192-195) (Public Notices of Attachment), show that the following property was attached on the 21st

day of August, 1942, pursuant to the writ of attachment (Plaintiff's Exhibit "D", supra) issued by the clerk of the District Court: Cord wood and timbers; gasoline, fuel oil and grease; merchandise and groceries; dump and contents of sluice boxes. The notice of attachment of the woodpile was posted on the woodpile; that attaching the gasoline, fuel oil and grease on the outside of the boiler house door; that attaching the merchandise and groceries on the outside of the messhall door; and that attaching the dump and the contents of the dump on a jim pole at the head of the sluice box.

Upon the service of the summons and complaint and the posting of the notices of attachment, appellants immediately ceased work and left the mine. (T.R. 84.)

A watchman, named Rylander, took possession of the property. (T.R. 142, 145.)

Plaintiff's Exhibit "G" (T.R. 167), the U. S. Marshal's docket sheet contains the following pertinent entries: That Pat O'Connor, Deputy, levied upon and took into possession per return personal property at Fish Creek, and appointed Emil S. Rylander custodian on the 22nd day of August, 1942; that on September 15, 1942, E. I. Tonseth, deputy, received authorization from plaintiff (the lessor Mike Stepovich) to release the custodian on September 14, 1942, and that the custodian was accordingly released; that the summons was served on the appellant James Zukoev and the appellant Nick Kupoff at Fairbanks

on the 24th day of August, 1942. The letter from the lessor authorizing the Marshal to dispose of the services of the custodian was admitted in evidence as Exhibit "H". (T.R. 174.)

It is admitted by the appellee in the pleadings that the case instituted by the lessor against the appellants was voluntarily nonsuited on the 24th day of November, 1942. (Paragraph VII of Plaintiff's Amended Complaint (T.R. 5) admitted by Paragraph VII of Defendants' Answer (T.R. 16).)

It was further testified to that, at the time when said voluntary nonsuit was entered, a return to mining under said lease would not be feasible or possible as the temperature was 42° to 45° below zero and that it would take a few months to clean the drift and shaft of ice and to re-timber the drift when it became possible to commence operations again. (T.R. 147-151.)

### C.

#### **Substantive aspects of constructive eviction.**

An eviction is a breach of the covenant of quiet enjoyment which covenant is implied in every lease in the absence of an express covenant to the contrary or inconsistent with that implication. See *Wallace v. Carter*, 133 Kan. 303, 299 P. 966; *Sandall et al. v. Haskins*, 104 Utah 50, 137 P. (2d) 819; *Best v. Crown Drug Co.*, 154 F. (2d) 736; *Boyle v. Bay*, 81 Colo. 125, 254 P. 156 and annotation on subject appearing at 62 A.L.R. 1257. In the instant case, the lease forming the subject matter of this action, containing

nothing inconsistent with that implication, a covenant of quiet enjoyment must be implied.

The existence of this covenant having been established, the question then resolves itself into a determination of what acts or conduct on the part of the lessor are sufficient to constitute an "eviction" which will operate as a breach of that covenant.

The general rule as to what constitutes an eviction is laid down by the Colorado Court in the case of *Isabella Gold Mining Co. v. Glenn*, 37 Colo. 165, 86 P. 349, at p. 350:

"There is a marked distinction between a trespass and eviction. A mere trespass does not amount to an eviction, though it may be accompanied by such acts, and committed in such circumstances, as to be equivalent thereto. An eviction may be actual or constructive; *and any act of the lessor by which his tenant is deprived of the enjoyment of the whole or a material part, of the demised premises, or which shows an intent upon the part of the lessor, permanently to deprive, or seriously to obstruct or interfere with, the tenant's quiet and peaceable enjoyment thereof amounts in law to an eviction. Hyman v. Jockey Club Co., 9 Colo. App. 299, 305, 48 P. 671; McAdams: Landlord and Tenant (3rd Ed.) Sec. 403.*" (Italics ours.)

The intent to deprive the lessee of his enjoyment of the leased premises need not be actual but may be inferred, nor need there be any physical ouster or ejectment. If the lessee yields to the acts of the lessor and abandons possession and if the natural and prob-

able consequences of the lessor's acts, inferred from their character, are such as to deprive the lessee of the use and enjoyment of the premises, a "constructive" eviction has taken place. *Westland Housing Corp. v. Scott*, 312 Mass. 375, 44 N.E. (2d) 959.

Nor does the fact that the "eviction" is achieved through legal process, as in the instant case, alter its character. *Hubble v. Cole*, 88 Va. 236, 13 S.E. 441.

Thus, in *Maggio v. Price, et ux.* ..... La. .... 1 So. (2d) 404, it was held that a sheriff's act in closing up leased restaurant premises and retaining keys, with the landlord's knowledge and acquiescence, in execution of a writ of provisional seizure, sued out by the landlord to protect his claim for rent, had the effect of evicting his tenants from the premises, so as to entitle them to cancellation of the lease as of the date of such eviction, though they made no demand on landlord for keys or possession of premises.

Although the Louisiana court applies the Civil Law, their code, Article 2692, obtains the same result as the Common Law implied covenant of quiet enjoyment, it being provided that it is the duty of the lessor to maintain the lessee in peaceable possession of the leased property. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429.

In considering whether or not there has been an eviction, the purpose for which the premises were leased must be considered. If the premises are rendered unfit for *that purpose* by conduct of the lessor, the fact that possession may be retained nakedly or

for other purposes is of no moment. *Pridgen v. Excelsior Boat Club*, 66 Mich. 326, 33 N.W. 502.

The law is well summarized in *Silber v. Larkin et al.*, 94 Wis. 9, 68 N.W. 406 (1896):

“The law governing the subject of this action may be briefly stated as follows: An actual expulsion from the leased premises is not necessary to constitute an eviction. Any act on the part of the landlord which so interferes with the tenant’s possession of the leased premises as to unfit them for the purposes for which they were leased, and render them uninhabitable for such purposes, and compel the abandonment thereof, constitutes an eviction. *Leadbetter v. Roth*, 25 Ill. 587; *Hoeverler v. Fleming*, 91 Pa. St. 322; *Royce v. Guggenheim*, 106 Mass. 201; *Sherman v. Williams*, 113 Mass. 481. Such an eviction furnished ground for an action for such damages as are the natural and proximate consequences thereof.”

From the facts that appellants’ evidence reasonably tends to prove and the inferences fairly deducible from those facts, it would appear not open to doubt that appellants have made out a *prima facie* case of eviction in breach of the implied covenant of quiet enjoyment.

The premises were leased for a certain term for the purpose of mining. The entire benefit to be derived by the appellants from their possession of the leasehold was their share of the precious minerals recovered therefrom. After over six months of preparatory and exploratory work, appellants struck a rich pay streak. That the decedent lessor had knowledge



of this strike may be inferred from the fact that he visited the workings at least every other day and panned gold after commencement of the exploratory drift. Shortly after the pay was located and in the same month, the decedent lessor instituted suit against and procured the issuance and levy of a writ of attachment on the personal property of the appellants located on the claim. The complaint in that proceeding stated five causes of action, but one of which represents any alleged personal claim against the appellants—the other four representing obligations due and owing third persons which had been assigned to the lessor the day before the action was commenced. Appellants' evidence stands uncontradicted in this case that there was nothing due on the personal claim. For what purpose would the lessor, having knowledge of a discovery of a rich vein on the leased claim, fabricate a cause of action and purchase credits of third persons against his lessees? It is difficult to describe such conduct in a restrained manner, but, if anything, it certainly sustains the inference that the lessor intended to regain possession of the claim and to dispossess the lessees—and to that end employed an ostensibly legal procedure. His conduct would have commanded more respect had he recruited an army to rout his "newly-discovered" foe. Appellants then would have understood their position. But, apparently decedent was not inclined to employ the frontal attack—he chose rather the equally efficacious but "nicer" tactic of sweeping appellants out with a legal process they could hardly hope to comprehend.

There is still other evidence of the end intended by the decedent lessor and the attainment of that end. A custodian was placed in charge of the claim to see that the property attached was not lost, damaged, removed or destroyed. If it be suggested that decedent did not authorize this, one need only turn to appellants' Exhibit "H" (T.R. 174), a letter authorizing the Marshal to dispense with the services of "a keeper and watchman on the premises".

Could the appellants have continued to mine the claim after the attachment? Could they have continued to occupy and enjoy the claim for the very purpose for which it was leased? One need only examine what was attached under the writ to answer in the negative. Attached by the writ and in possession of the custodian were the appellants' cord wood, fuel oil, gasoline and grease; the dump consisting of pay dirt was removed by appellants from the mine and the contents of the sluice box—the product of appellants' labor. With no wood to heat the boilers, no fuel to operate their machinery, no food to eat and no sluice box through which to run their gravel, and no gravel to run through the sluice box—it must be apparent to anyone that appellants could not continue their mining operations. This was so serious an interference by the lessor with the lessees' enjoyment of the demised premises as to justify—to more than justify—to compel an abandonment of the claim; and the appellants promptly did just that. Thus a great victory against his foe was won by the decedent lessor.

Further proof of the decedent's object in commencing the action and procuring the attachment may be inferred in his voluntary nonsuit of the cause after the advent of cold weather had made unfeasible a resumption of mining operations. This also indicates that the end intended and the end obtained by the landlord was the permanent exclusion of the appellants from the claim.

In the light of the foregoing authorities and resume of evidence which was admitted, coupled with the inferential intent of the decedent deducible therefrom, there can be no doubt that appellants made out a *prima facie* case requiring that the evidence be submitted to the jury for their consideration.

As to whether or not appellants completed their *prima facie* case by showing a compliance on their part with the terms of the lease, if such proof were necessary, need not be considered as the Appellate Court must assume on appeal from a directed verdict that this element of the case has been proven, since a failure of evidence on this point was not specifically assigned by the trial Court to sustain its ruling in directing a verdict. (See Part IV of this brief.)

#### D.

##### Prejudicial evidentiary rulings.

A cursory examination of the transcript of evidence in this matter will reveal that counsel for appellants was met at every point in the development of his case by objections designed to obscure and be-

fog the issues rather than to elicit truth and to prevent prejudice. The profuse grounds of appellee's objections and the scarcity of reasons given for their sustainment cloud the record and make any objective analysis of what has been proven and what should have been proven a matter of great difficulty. If evidence is incompetent, irrelevant and immaterial, the better practice would be to require counsel to state with particularity the reasons therefor. And the same is true of any other objection. Cinematic attorneys and cinematic trials do not create standards for the bar to emulate. Absent telepathy, keen indeed must be the judicial mind which can, in the swift progress of a trial make infallible rulings from the source alone of its own knowledge unrefreshed by counsel's assistance. It is the function of counsel, as officers of the Court, to assist the judiciary in the attainment of truth.

Appellants will not endeavor to point out every error which occurred at the trial of the case, but will only seek to stress what are believed to be the more flagrant ones in the order that they occurred at the trial.

At page 59 of the transcript, after the appellant Nick Kupoff had testified that the decedent had visited the mine after August 8, 1942, the date when accounts were settled between the decedent and appellants, the following proceedings took place:

“Q. And what would he do (the decedent) if anything?

A. He went down there one day panning.

Mr. Hurley. I object to that; incompetent, irrelevant and immaterial. What he did out there. I don't see any connection.

The Court. (to appellants' counsel) What is the relevancy, Mr. Taylor?

Mr. Taylor. Panned the gravel. Found it was rich. The relevancy would show that he had knowledge of this pay streak.

The Court. Well, I don't see that it is material at all. Objection sustained." (Parentheses inserts ours.)

It is submitted that the Court erred. The decedent's knowledge was certainly material as it would tend to show the intent and purpose of his commencing an action in the District Court. Having discovered that appellants had located a rich vein, it may be reasonably inferred that he commenced the action to regain possession, dispossess the appellants, and work it himself. If this were not his purpose, appellee was free to introduce evidence to negative that intent. The material facts in issue were the dispossession of the appellants and the decedent's intent to effectuate that dispossession. Under the circumstances, evidence of knowledge was certainly relevant as it tended to explain the acts of the decedent.

At pages 86, 87 and 88 of the Transcript, the following proceedings took place in the interrogation of the appellant, Nick Kupoff:

"Q. Now, calling your attention to Paragraph II of the fifth cause of action, in which it is

alleged that the partnership was indebted to the Northern Commercial Company in the sum of \$387.99 on the 24th day of June, 1942, and \$200.00 had been paid thereon, and there was a balance of \$187.99 due the Northern Commercial Company on the 24th day of June?

A. Ya, that is right, from company.

Q. Now, also paragraph IV of the fifth cause of action alleges that the Northern Commercial Company, on the 21st day of August, 1944—or '42, assigned and transferred the said account to Mike Stepovich. Could you state whether or not such an assignment had ever been made?

Mr. Hurley. We object to that; incompetent, irrelevant and immaterial. No foundation laid; doesn't show this defendant knows what the Northern Commercial Company did in regard to their claims.

The Court. Objection sustained.

Q. Mr. Kupoff, since you left the Eastern Star claim and—have you ever received any bills from the Northern Commercial Company, asking for payment of that particular account?

Mr. Hurley. We object to that; incompetent, irrelevant and immaterial. Not within the issues of the case.

The Court. Objection sustained.

Mr. Taylor. Well, if the court please, we believe that is certainly competent. There is no showing that there was any assignment made of these various claims, your Honor.

The Court. They allege it, don't they?

Mr. Taylor. They allege it, but we want to show they were not made.

The Court. There is nothing to show this man has any knowledge of the matter at all. He isn't in a position to testify to it.

Q. Mr. Kupoff, did you know of the indebtedness of your partnership to the Northern Commercial Company?

A. Yes.

Mr. Hurley. Just a minute. I object to that; incompetent, irrelevant and immaterial. Not within the issues of the case.

The Court. Objection will be overruled. He said he still owed it.

Mr. Hurley. I understand, your Honor, but if the claim has been assigned by the Northern Commercial Company, he doesn't owe it.

The Court. What is your question, does he owe it to the Northern Commercial Company or does he owe the bill?

Mr. Taylor. This amount.

The Court. Then I will sustain the objection to the question.

Q. Mr. Kupoff, do you now owe the Northern Commercial Company a balance of \$187.99, which was owed by the partnership on the 24th day of June, 1942?

Mr. Hurley. Just a minute, your Honor, I object again. It is the same thing.

The Court. Objection sustained."

The foregoing is illustrative of the difficulties that appellants met in the presentation of their case. Certainly, the appellant Kupoff should have been allowed to testify that the debt allegedly assigned by the Northern Commercial Company was still due and

owing. It is futile to argue that he couldn't testify to that fact because he had no personal knowledge of the matter for he was one of the debtors. Certainly, such fact was relevant to the issues raised by the pleadings. From such a fact, several inferences may be reasonably drawn: (1) That no assignment had ever been made; (2) That, if it had been made, there was a re-assignment made sometime after the decedent had accomplished the purpose of his suit; (3) That the assignment was not supported by a consideration, but was gratuitously made for the purpose of assisting the decedent to accomplish his object of evicting the appellants. In this connection, it should be recalled that the decedent entered a voluntary nonsuit which was admitted by the pleadings. Any of the above inferences would serve to qualify or explain that act which would further serve to make it relevant evidence in a legal sense. Above all other considerations, the fact sought to be shown and erroneously excluded, coupled with the circumstances of the nonsuit, would inescapably support the conclusion that the decedent's motive for commencing the suit in question was to accomplish that end which in fact was obtained—the ejection and exclusion of the appellants from the mining claims.

The proceedings which were had at pages 153 to 155 of the Transcript of Record deserve special attention. On direct examination of the appellant James Zukoev, counsel for appellants attempted to elicit from his witness information as to what the custodian had said with reference "to staying on the premises and



staying away from the sluice boxes". This question was met by appellee's attorney's usual objection of "incompetent, irrelevant and immaterial, not within the issues", and the startling innovation given as an additional reason that "anything that might have been said by the custodian is not binding on the Defendant." Previously, the appellant Nick Kupoff had testified (T.R. 83) that the attaching deputy had told the appellants to move. This was stricken (T.R. 84) for the express reason that there was no authority shown from "the Plaintiff in the case to do those actions." The propriety of these ruling will be questioned shortly. On cross-examination counsel for appellee obtained the following facts from the witness: That the appellants left the premises a couple of hours after the attaching deputy had arrived at the claim and that the appellants had returned to the claim three or four days later to procure their "beddings". The purpose of counsel's questions on this score was apparently directed towards negating any suggestion to the jury from direct examination that the appellants' vacation of the claim had been something less than voluntary. In order to rebut and negate the matters brought out on cross-examination counsel for appellants asked the following question (T.R. 154): "When you went back three or four days after you were ordered off by Mr. O'Connor, who gave you permission to go back?" Counsel for appellee objected on the usual grounds: "Incompetent, irrelevant and immaterial, not within the issues of the case. \* \* \*".

Attorney for appellants made the following offer to prove (T.R. 155): "We offer to prove by redirect examination on rebuttal examination that to go out there, these men had to secure permission from Mike Stepovich (the decedent) and they got a letter from Mike Stepovich to the custodian out there, allowing them to go out and get their blankets and stuff from the camp."

This offer to prove was erroneously rejected and appellee's objection sustained. We can discover no basis in law or reason for the trial Court's rejection of the proffered evidence. The law prescribing the proper scope of redirect examination is too well known to require citation of authority. An attorney, on redirect examination, may examine a witness as to any matter gone into on cross-examination or any inference reasonably deducible therefrom, and may also introduce through that witness any matters which tend to qualify or explain what opposing counsel brought out on cross-examination; subject, of course, to the further limitation, that the matters so inquired into do not fall within some rule of exclusion. Having stated the rule, it becomes immediately apparent that its application to the present situation would require the admission of the proffered evidence. It was certainly admissible evidence in that it tended to qualify or explain the visits of appellants to the claim after the attachment had been levied. Furthermore, it was relevant and material in a practical, legal sense in that it would show that decedent had knowledge of the exclusion of appellants and the appointment of

the custodian. From this it could be inferred that (1) he had either authorized and directed the ouster in the first place or (2), that, by his failure to remedy the matter after it had come to his attention, he had ratified the acts of the deputy and custodian and made them his own. (See *Maggio v. Price*, supra.)

Returning now to the Court's refusal to allow evidence that the deputy and custodian had directed the appellants to leave the claim, as above mentioned, apparently upon the ground that such evidence was inadmissible unless the prior authority to do these acts was shown (for the relevancy and materiality of the evidence cannot be sincerely questioned), it is submitted that the Court erred in such refusal. We frankly recognize that the trial Court has considerable discretion in determining what the order of proof shall be in a given case, but we do not believe that that discretion should be exercised in such a manner as to effectively deprive counsel of an opportunity to get his facts before a jury so that their function of fact-finding may be exercised. Proving any express authority by a deceased party directed to a marshal, a deputy or a custodian to do a particular act presents almost insurmountable obstacles in the field of evidence alone, not considering for a moment the practical difficulty of discovering evidence of direct authority.

In such a case, practice and experience dictates that we must determine from the circumstances alone whether that authority did or did not exist. At the

time Zukoev was asked whether the custodian had told him to leave the premises (T.R. 153), it had been established by appellants' evidence that the decedent had sued out a writ of attachment against appellants on several assignments and on a fabricated personal claim. In the levying of that attachment, the deputy acted in a dual capacity—as an officer of the Court and as an agent of the decedent. Aside from the fact that the decedent, as principal, would be responsible for the mode and manner of the execution of the writ within the scope of the deputy's authority, it may be inferred, from his manifest purpose in commencing the suit, that he had directed the deputy of the U. S. Marshal to exclude the appellants from the claim. This inference, coupled with the evidentiary presumption that a deputy acts within his authority and according to his instructions (31 *C.J.S.* (Evidence), Sec. 146, p. 826), it is submitted, lays a sufficient foundation for introducing evidence of an actual eviction by the attaching deputy and of remarks made by the custodian placed in charge by that deputy. Furthermore, when counsel for appellants sought to introduce evidence as to what the ordinary procedure of attaching personal property outside of town consisted of, he was prevented from so doing. (T.R. 174, 175.) Counsel for appellants was caught in the dilemma of being damned if he did and damned if he didn't.

## VIII.

## FAILURE OF EVIDENCE AS TO DAMAGE.

The fourth ground stated by the trial Court to sustain its direction of a verdict for appellee was a failure of evidence as to damages or, as pressed by the Court, "no specific showing as to any damage". On this particular point, the trial Court exhibited no parsimony of reasons to support its conclusions. Summarized, those reasons may be stated as follows: (1) That appellants failed to show the volume of gold-bearing gravel which they could have recovered, and the gold content thereof; (2) That appellants did not show the costs which would have been incurred in removing the gravel and reducing it to its gold content; (3) That no specific prayer was made to recover the \$20,000.00 worth of gold alleged to be contained in the dump or unsluiced gravel which remained at the time appellants left the premises, and further, that there "was no proof there was any particular amount (gold, apparently) in the dump, or that the marshal or Stepovich (the decedent) had cleaned it up." (T.R. 273, 274.) (Parentheses inserts ours.)

The reasons advanced by the trial Court to sustain its rulings will be treated in this brief in the above stated order, together with a consideration of rulings at the trial of the cause which appellants deem erroneous and prejudicial.

## A.

**Failure to show volume of gravel and gold content thereof.****1. Value or gold content.**

For the purpose of showing the volume of gold-bearing gravel remaining to be worked on the disputed claim and the estimated value thereof, attorney for appellants called as witness Joseph Ulmer, a qualified mining engineer of 45 years experience who had received an under-graduate degree in engineering from Polytechnic at Lins and a certificate of post graduate work from the School of Mines at San Francisco. Mr. Ulmer's qualifications are set out at pages 196 to 198 of the transcript of record and his entire testimony is encompassed in pages 198 to 219. We request that this Court read this testimony in its entirety, in order that it might fully appreciate the obstacles imposed to appellants' proof of a matter which is inherently difficult of proof even with some degree of judicial cooperation. Rules of evidence are not designed to impose inflexible standards of procedure on counsel. Their object is to aid in a judicial determination of truth and their development and refinement in the judicial process has been ever mindful of that end. In the application of those rules to particular questions, a trial Court is vested with considerable discretion—but that discretion should be exercised with a view towards the object and purpose of those rules.

After Mr. Ulmer had testified to visiting the leased premises named the Eastern Star Claim in the summer of 1942, he was asked by appellants' attorney to

tell the jury what exploration work he had found to have been done on the claim (T.R. 199)—“by Mr. Stepovich and the F. E. Company”. (T.R. 200.) This was objected to and sustained, perhaps correctly so, upon the grounds that no prior evidence had been introduced that the F. E. Company or Mike Stepovich had done any exploratory work on the claim. (T.R. 200.) The order of proof is largely discretionary with the trial Court and we will not quarrel with a ruling that shows no patent abuse of that discretion. But counsel, having been informed of the errors of his ways, sought to amend his course accordingly and lay a foundation for his examination by asking his witness the following preliminary question:

“Q. Mr. Ulmer, did you know if any other parties had made an exploratory examination of that property?”

This question was met like a broken record with opposing counsel’s “incompetent, irrelevant and immaterial”, which objection was sustained by the Court without reason given. Certainly, appellants’ attorney was entitled to a minimum leeway in asking preliminary questions and in laying a foundation for an examination of his witness. If the question had no legal relevancy, it had none in the same sense that the question “what is your name?” possesses no legal relevancy inasmuch as an answer of “Richard Roe” or “John Doe” will, generally speaking, not affect the substantive rights of the parties. But the error committed here is a more serious one than a mere refusal to permit a preliminary question. The Court here,

has suggested to counsel the proper approach to be made in the examination of his witness and then, in the same breath, refuses to sanction that approach.

Not satisfied that his rebuke was permanent, counsel posed the following question:

“Q. Mr. Ulmer, as a result of your examination of the surface of that claim, were there any indications of that claim having been drilled to ascertain its value?” (T.R. 201.)

As inevitable as light follows darkness came the objection of incompetency, irrelevancy and immateriality, but deeming the matter one to require elaboration, appellee’s counsel added the following reasons: “Doesn’t have anything to do with the issues of the case, who drilled the hole, or what the value was. This is a claim that might have been drilled. I don’t know. But, that is—wouldn’t be the best evidence.” The trial Court sustained this objection. Whether it was sustained for one, all, or none of the grounds suggested by appellee’s counsel, does not appear. For aught that appears, counsel for appellee was interposing an objection to a question he had dreamed up—not the one asked by appellants’ attorney. Appellants’ attorney did not ask “who drilled the hole”, but whether there were indications that it had been drilled. The value of the claim was certainly relevant. Appellants were seeking damages for what they might have recovered from the claim had they been allowed to remain in peaceable possession. The objection that it wouldn’t be the “best evidence” is equally absurd as appellants were offering nothing in evidence.



There being no other reason advanced by the trial Court to sustain its ruling, and there being none which we can think of which would sanction the ruling, it is submitted that the trial Court's ruling was error.

The next question appellants' attorney asked was whether the witness had any drill logs showing the result of drilling on that particular claim. Appellee's attorney objected on the grounds that drill logs wouldn't be competent unless they were the result of drill holes on the ground actually being mined. (T.R. 201.) The objection was sustained upon the grounds that the question had no relevancy as asked. Again, as seems to be true throughout the testimony of Mr. Ulmer, the objection was premature as was its sustainment. It was incumbent on appellants' attorney, in the regular order of proof, to ascertain first whether his witness had any drill logs showing the results of drilling on the claim, before he could be allowed to show where the holes had been drilled and what values they revealed. Thus were appellants effectively blocked on that line of inquiry.

Finding himself blocked in this approach, appellants' attorney then asked the witness: "Mr. Ulmer, did you ever have any conversation with Mike Stepovich during his lifetime, regarding the values in various holes adacent to, or on the workings that Mr. Zukoev and Mr. Kupoff were carrying on mining operations?" (T.R. 202.) The Court promptly blocked this attempt by counsel upon an objection of incompetency, irrelevancy, immateriality, remoteness, indefi-

niteness, not binding, that counsel did not limit where holes were and that what drill holes show are not definite. Let us treat counsel's objections in the order in which they are made.

Incompetent evidence is evidence which is unfit for the purpose for which it is offered. 31 *C.J.S.* (Evidence), Sec. 186, p. 906. Again, counsel has been premature in his objection. The question asked was a preliminary one laying a foundation for an inquiry as to values discovered on or adjacent to the ground being mined by the appellants. But, assuming for the purposes of argument that the objection is not premature, the question then posed is whether drill holes adjacent to or on the ground being mined are fit or competent evidence to show the value of the ground. Before answering that question, it is well to consider the practical difficulties met in proving the value of mining ground. There is, generally speaking, no consistency of gold content in gravel over any appreciable area. The best evidence of what the gravel contains would be to remove it from the bedrock and sluice it through the boxes. But this appellants were prevented from doing. Concededly, this is the only foolproof or infallible method of ascertaining the gold content of gravel. Examined from this viewpoint, the answer to this question hinges on the answer to a second question of whether it is the policy of the Courts to require such an exactitude and certainty of proof as to effectively deny relief in any case where anticipated recoveries from a mining claim constitute the damages which are sought? To ask the question is to an-

swer it. A rule of law that would require strict proof of value under the circumstances would operate to encourage mine owners to breach their lease when the exploratory work of the lessees had uncovered the pay streak.

If permitted to digress for a moment, if it were the opinion of the trial Court (and the trial Court states no reason for sustaining the objection) that the value of drill holes on or adjacent to the ground being mined by appellants was not competent evidence of value, then certainly the next question posed by appellants' counsel should have been permitted:

“Q. Mr. Ulmer, what is the procedure to ascertain the value—that is, the procedure that a mining engineer follows to ascertain the values in a placer mining claim?” (T.R. 202.)

The obvious purpose of asking this question was to lay a foundation for a determination of what had been done particularly with respect to this claim to determine its value. And appellants' attorney so explained when queried as to its relevancy by the trial judge. (T.R. 203.)

“Mr. Taylor. We want to show this ground was drilled; there was a definite value in there in the immediate vicinity where the men were working. We have to show the values in it. We can use any evidence we can possibly get, if we can show what was taken out before that by others mining on that ground. I just asked how he determines the value. It is not as to this particular claim, but as a general procedure a mining engineer goes through.”

Immediately upon conclusion of counsel's reasons as stated, appellee's attorney made the following remark:

"Mr. Hurley. But that can't be binding, your Honor. Drill holes don't always tell the truth."

Whereupon, with justification, appellants' counsel remarked:

"We are not asking about drill holes. We are asking him to tell how they ascertain values—— (interrupted.)"

Interrupting counsel, the Court stated:

"I will sustain the objection."

It is very likely that there was some degree of oppressive finality in the Court's interruption. No one, we feel, would have blamed the appellants' attorney if he had refused to carry the case further. Like Henry's "Invictus", his head must have been "bloody, but unbowed", for he continued his examination

Returning now to the other reasons advanced by appellee's counsel in his objection to appellants' question as to a conversation with Mike Stepovich (the decedent) relative to the values of drill holes adjacent to or on the workings of the appellants (T.R. 202), the next reason assigned was irrelevancy. Again the reason stated was premature as the question asked was whether there had been a conversation. But assuming again, for the purposes of argument, that the reason stated was timely, then the matters which were apparently to be inquired into certainly were relevant.

Relevancy is defined by 31 *C.J.S.*, Sec. 158 (*Evidence*), p. 864, as follows:

“Logic is the controlling factor in the modern law of evidence. An offer by a party to prove a fact in evidence involves an assertion by him that such a relation exists between the fact offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter, and the relation thus asserted is termed ‘relevancy’. It is therefore a basic rule of evidence that evidence of whatever facts are logically relevant to the issue is legally admissible except as it may be excluded by some specific rule or principle of law.”

Certainly, there can be no question, by definition, of the relevancy of remarks made by the decedent with respect to the values of his claim. In issue were the damages that appellants sustained by not being allowed to recover their share of the mineral content of the land. Decedent was the lessor and owner of that claim. If anyone knew its value, he did. His remarks would tend directly to prove that value.

The next reason assigned by appellee’s counsel in support of his objection was “immateriality”. Materiality means simply that the fact which the relevant evidence tends to prove is material to the issues raised by the pleadings; that is, the fact is a necessary link in the chain of proof. 31 *C.J.S.* (*Evidence*), Sec. 158, p. 866. The fact which decedent’s remarks would tend to prove was the value of the ground worked by appellants which fact was directly in issue.

Equally invalid and not deserving of the trial Court's consideration was the supporting reason of "remoteness". The question asked was a preliminary one. Yet, to be determined was the time at which the conversation took place, or the circumstances surrounding it. The same reasoning is applicable to the argument of "indefiniteness".

The next reasons assigned by appellee in support of his objection, "not binding, did not try to limit where this was, and it is not definite, anyway, as to what a drill hole might show" may be summarily disposed of. For a preliminary question "adjacent to and on the workings" of appellants is certainly definite enough; and if "drill holes" aren't competent evidence of values, then there is no way other than by mining to exhaustion to determine the gold content of a claim. Appellants are not certain as to what appellee's counsel meant by "not binding". If it is meant that the statements of the deceased lessor were inadmissible to bind his estate, then it is sufficient answer that appellants were not permitted to procure from their witness the circumstances surrounding that conversation.

There are other errors apparent of record in the testimony of Mr. Ulmer. The foregoing excerpts and discussion, however, serve to illustrate that appellants' attorney was blocked at every turn in his effort to show the value of the ground which remained to be mined. His was a difficult task in the absence of prejudicial rulings on the part of the Court and an impossible one in view of those rulings.

Within the possession and control of appellee is the information necessary to make a definite statement of what the ground contained. Appellants should have been permitted to present their case, and if the resultant estimate of damages was too high, appellee was free to introduce evidence tending to reduce or negative the estimated damages. The Court's attention is called to the case of *Isabella Gold Mining Co. v. Glenn*, 37 Colo. 165, 86 P. 349 (cited supra in section of brief dealing with substantive aspects of constructive eviction). Although the facts of that case are concededly different from the present case in that the evidence introduced by the evicted lessees to prove what they could have mined during the duration of their term was of the value of ore recovered by other lessees of the evicting lessor; still the attitude and reasoning of the Colorado Court are, it is submitted, applicable to the instant case.

Said the Colorado Court, pp. 350, 351:

"For the purpose of proving that they could and would have mined, during their term, at least as much ore as defendant and its lessees on the Emma No. 1 wrongfully took from the Comet during such period of time, and as tending to show the amount of their damages, or at least one element thereof, plaintiffs produced evidence that, under defendant's order, its lessees on the adjoining Emma No. 1, mined and marketed ore from the premises demised to plaintiffs in value largely in excess of the amount of the verdict. There was not, in every respect, a detailed and exact showing as to the amount, or value, of what

came from the Comet and what, if any, from the Emma No. 1, or just what was mined from the former during the term of plaintiff's lease. Defendant says there was no evidence at all that any part of such ores came from the premises let to plaintiffs, and none, on which any satisfactory computation could be made, showing the amount taken during the term. In this claim defendant is mistaken, though the evidence be not so explicit as it might be. However, that may be, it is entirely clear that if there is any uncertainty, either as to the amount or value of the ores which plaintiffs would and could have mined and sold during the term of their lease, this ambiguity could easily have been removed by evidence which was wholly under the control, and within the power, of the defendant company to produce at the trial. In such a case as this, every reasonable intendment in support of a verdict for a plaintiff will be made. A case quite in point is *Little Pittsburgh M. Co. v. Little Chief M. Co.*, *supra*. Without further discussion, this contention of the defendant may be disposed of by saying that the verdict of the jury is sustained by the evidence. But if the evidence were more indefinite than it is, we would not disturb the verdict because, in the circumstances of this case, the eviction being proved and the extraction of large bodies of ores by defendant and its other tenants being shown, the burden was upon defendant to prove the amount and value of the ores which it and its lessees removed during the term of the plaintiffs' lease, and it entirely failed to discharge that duty."



When appellee's decedent repossessed the claim in the instant case, that repossession operated as a conversion of appellants' interest in the leasehold—their interest in the gold in place—what might have been recovered had appellants been allowed the peaceable possession of the claim for the duration of the term. With the lessor and his successor in interest rested the more exact knowledge of the mineral content of the claim and, if they choose not to come forward with that information, they are the ones to suffer from their silence—not the appellants.

In our treatment of evidentiary rulings, we have cited but little authority and that from an encyclopediac source. It is felt that the questions involved are, basically, fundamental ones in the field of evidence—a cutting ring on which every infant attorney grinds his teeth. Case authority is of little assistance. The fundamental rules remain unchanged—their application varied. Considering the multitude of cases involving the application of each rule, searching for an analogous case is an exhaustive and almost prohibitive task—a search for the proverbial needle. We all know the rules and the question on appeal is ultimately one of whether those rules were properly applied towards the ends of justice or prejudicially perverted in their application—having in mind at all times the peculiar facts and circumstances of each case.

## 2. Volume of gravel.

Having been prevented from proving the value of the gravel, there would be little or no reason for appellants to show its volume. That showing its value was a condition precedent to determining its volume was the ruling of the trial Court.

At pages 216 and 217 of the Transcript of Record, the following proceedings were had:

“Q. Mr. Ulmer, how many yards of gravel would be—or, no—how many square feet of bed-rock would there be from the face of the drift—when you seen it, to the boundary line of the claim?”

At this point, attorney for appellee made his usual objections and appellants launched a general protest against his conduct, at which point, the following occurred:

“The Court. No relevance unless there is testimony of the gold content of the gravel.

Mr. Taylor. Sir?

The Court. I say, there is no relevancy to showing the quantity of gravel without showing the values.

Mr. Taylor. That is what we are trying to—going to want to show, your Honor. We have showed the value already, by Mr. Zukoev and Kupoff, and we are going to show the gravel by this mining man who is a mining man of years standing.

The Court. All right, objection sustained.”

As heretofore shown, counsel was prevented from showing the value of the gravel by the rulings of the

Court. Here the Court uses as a reason for rejecting evidence of the volume, the very failure which had been induced by its rulings.

As indicated in the protest of appellants' attorney above, there had already been some testimony as to value. Appellant Nick Kupoff had testified (T.R. 47) that the gravel at the end of the drift, where appellants opened a thirty-foot face, ran a dollar and a half a pan in some spots and appellant James Zukoev (T.R. 131) testified that some gravel from the pay streak ran from a dollar and a half up to two or three dollars a pan. Appellee could not have complained if the Court had considered that evidence of value, coupled with the testimony of Ulmer as to the extent of the gravel, if permitted, as sufficient to take the case to the jury, since it was within the power and control of appellee to introduce their evidence of the true value of the claim. Nor would it have been improper in view of the *Isabella* case, above cited, for the trial Court to indulge in the presumption that the gravel exposed in the face of the mine extended to its limits.

### 3. Failure to show costs.

Here again it would have been futile for appellants to have introduced evidence from which a jury might make a reasonable estimate of its costs in removing gold from gravel, the volume and value of which it was not permitted to prove. As a matter of fact, no evidence could be introduced on that score until the volume of gravel was shown. So, if the record is de-

void of evidence on that point, the failure may not be attributed to appellants or their counsel, but the responsibility rests with the trial Court.

## B.

### **Failure of evidence with respect to dump and its contents.**

#### **1. No specific prayer to recover.**

It was apparently the trial Court's opinion that since appellants had made no specific prayer to recover \$20,000.00 worth of gold alleged by paragraph VIII of the Second Amended Complaint (T.R. 6) to be contained in a dump at the time of appellants' eviction, that appellants were precluded from proving themselves entitled to their share of the contents of the dump. This is error.

Appellants were entitled to a liberal construction of their complaint and prayer. Especially is this true where the trial Court must decide whether or not to divest the jury of their function as triers of fact. And, as heretofore pointed out in this brief, every intendment is to be resolved in favor of the party against whom a verdict is directed. With these principles in mind, it is submitted that the allegation of Paragraph VIII of the Second Amended Complaint, of the appropriation of the decedent of the dump containing \$20,000.00 worth of gold is not inconsistent with the later allegation of the loss of \$100,000.00 as appellants' share of what would have been recovered had appellants been permitted to remain in possession for the balance of their term. The prayer for relief asks damages in the amount of \$106,791.29—the \$6,-

791.29 representing expenditures by the appellants in the development of the property. Adopting a construction most favorable to the appellants, as we are required to do, it must be concluded that the \$20,000.00 value of the dump was included in the prayer for \$100,000.00 anticipated recovery. The contents of the dump as well as the gold in place are values which plaintiff would have recovered but for the wrongful eviction.

But even if the trial judge were correct in his holding that the prayer for relief did not encompass the amount of gold contained in the dump, still that would not justify a denial of relief. As a general rule, the prayer for relief forms no part of the complaint or petition and the allegations in the body of the complaint and the proof in support thereof fix the amount of recovery. *U. S. Fidelity & Guaranty Co. v. Nash*, 20 Wyo. 65, 124 P. 269, denying rehearing 20 Wyo. 65, 121 P. 541. Also, see authorities cited 41 *Am. Jur.*, Sec. 109 (Pleading) p. 3661. And the prayer has been held by the Alaskan District Court to form no part of the complaint. *Kline v. Flannigan*, 7 Alaska 577. Furthermore, Sec. 55-9-21 *A.C.L.A.* 1949, expressly limits the recovery permitted a plaintiff on failure of the defendant to answer to the amount stated in the summons or prayed for in the complaint. Inferentially, that section sanctions no such limitation where an answer has been filed.

It requires no citation of authority that a trial Court must, as a general rule, disregard any error or defect in the proceedings which do not affect the

substantial rights of the adverse party. That appellants were seeking recovery of the \$20,000.00 alleged to be contained in the dump was apparent on the face of the pleadings. At no time during the proceedings did appellee's attorney evince any surprise at evidence introduced by the appellants with respect to the dump, nor did he manifest his surprise by asking for a continuance. Nor, did either of appellee's attorneys call this point to the Court's attention in their argument supporting their motion for a directed verdict. Yet, the Court chose to rest its ruling partially on that technicality.

**2. No proof as to gold content of dump.**

Apparently, on the grounds that it might be in error on its ruling with respect to appellants' prayer for relief, the trial Court held that there was no evidence as to the gold content of the dump. In this the Court erred.

At page 47 of the Transcript of Record, Nick Kupoff testified that appellants had exposed a 30-foot face at the end of the drift in the pay dirt; and that he was able to get as much as a dollar and a half a pan from some spots in that face. There were approximately 200 yards of gravel in the dump when appellants were evicted (T.R. 57) and that gravel had come from the rich pay streak. (T.R. 58.) Previously, Kupoff testified that there had been three cleanups of gravel taken from the exploratory drifts prior to striking pay dirt. Three to four hundred yards of dirt were run through the sluice boxes on

each of these occasions and the gold recovered was valued at \$1,400.00, \$1,600.00 and \$1,265.00. (T.R. 57 and 58.)

James Zukoev testified that once in awhile there would be a good pan from the pay streak which ran from a "dollar and a half to two or three dollars", and that a pan of dirt was equivalent to a good, full mining shovel. (T.R. 131.)

It is submitted that the above testimony presented sufficient evidence to go to the jury on the question of the values contained in the dump. Admittedly, it is not the most precise or exact evidence of damages ever presented. But, having due regard for the circumstances and the inherent difficulties involved in proving values, it gave the jury sufficient facts from which to make a reasonable estimate of damages—although, perhaps, an inadequate estimate. A jury would be perfectly justified, for example, in making the following computation: The least that appellants had recovered from three prior cleanups was \$1,265.00; and the gravel run through each one of those cleanups was as much as 400 yards; therefore, since the 200 yards of gravel remaining in the dump came from richer ground than that removed from exploratory drifting, the appellants would have recovered at least one-half of the amount of the gold removed on the least lucrative of the cleanups—that is to say, \$632.50.

Nor would a verdict of the jury allowing for some upward adjustment of the amount determined in view of the richer gravel involved be erroneous. In this

respect, it should be considered that this jury sat in a mining country and, it is submitted, would know the volume of dirt contained in a "good mining shovel or gold pan".

The only requirement imposed by the law is that evidence of damages be not entirely speculative. Only a reasonable degree of certainty is required. As stated in *Paul v. Cragnas*, 23 Nev. 293, 59 P. 857, p. 862:

"All that can be required in any case or upon any subject is that the evidence shall tend, with a fair degree of probability to establish a basis of relevant inference \* \* \*."

3. No evidence that marshal or decedent had cleaned up dump.

For good measure, and as an additional reason for taking the case from the jury as far as the dump was concerned, the trial Court held that there was no evidence that the marshal or decedent had taken its values. It is rather difficult to understand the legal significance of this point if there was, in fact, a failure of evidence with respect to it. It is appellants' contention that the contents of that dump were part of the values which they would have recovered had they been allowed to remain in peaceable possession for the balance of the term. The act of eviction operated as a conversion of these values. It was in this sense that decedent appropriated the dump.

However, assuming appellants' view is wrong, was there a failure of evidence that the decedent converted the dump—that he sluiced it and took his values? In this connection it must be remembered



that appellants' evidence, as heretofore considered, tends to prove that decedent's considered scheme was to evict his lessees and capitalize on their labor.

The testimony of appellant James Zukoev (T.R. 155-159) reveals that he returned to the mine to get his bedding approximately three to four days after the eviction; and that the dump was gone—that the gravel had been washed. During that three to four day period, a custodian was in charge of the personal property attached on the claim—a custodian who was paid by the decedent to protect and preserve the property attached by the decedent. Certainly, a reasonable inference to be drawn from those circumstances is that the decedent had washed the gravel and converted its values to his own use.

### C.

#### Conclusion to section on damages.

In conclusion, we wish to call this Court's attention to the fact that even if there had been a failure of evidence as to damages, still appellee was not entitled to a directed verdict, nor was it proper for the trial Court to direct a verdict where, as in the instant case, appellants have established a *prima facie* case entitling them to at least nominal damages. (*Puutis v. Roman*, 76 Mont. 105, 245 P. 523; 25 C.J.S. (Damages), Sec. 176, p. 859.)

And even if it is held that appellants' evidence in the instant case, is not sufficient to give the jury a basis upon which they can make a reasonable estimate

of damages, still they have proved an actual loss for which they are at least entitled to nominal damages. (*Call v. Coiner*, 43 Idaho 320, 251 P. 617.)

Dated, Fairbanks, Alaska,  
May 15, 1950.

Respectfully submitted,

WARREN A. TAYLOR,

*Attorney for Appellants.*

1950 - 1  
No. 12,367

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership  
doing business under the firm name  
and style of North Star Mining Com-  
pany,

*Appellants,*

vs.

VUKA RADOVICH STEPOVICH, Executrix  
of the Estate of Mike Stepovich,  
Deceased,

*Appellee.*

BRIEF FOR APPELLEE.

FILED

JUL 20 1950

PAUL P. O'BRIEN,

CLERK

JULIEN A. HURLEY,  
MIKE STEPOVICH, JR.,

Fairbanks, Alaska,

*Attorneys for Appellee.*







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**BRIEF FOR APPELLEE.**

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**STATEMENT.**

That on the 13th day of February, 1942, Mike Stepovich entered into a written Lease with appellants, a copy of which was attached to the Second Amended Complaint on file herein. That appellants entered into possession of the North Star Mining claim described therein together with the mining property, buildings, tools and equipment of the said Mike

Stepovich which were upon said claim and agreed to pay as royalty for the rights and privileges under the said Lease, one-third of the gross amount of all gold and other precious metals from each and every clean-up held on said ground.

That on the 21st day of August, 1942, the said Mike Stepovich, Deceased, filed a Complaint in the District Court for the Territory of Alaska, Fourth Division, in which five causes of action were separately stated and in which he demanded judgment against appellants on the first cause of action in the sum of \$2700.00, on the second cause of action in the sum of \$133.50, on the third cause of action for the sum of \$18.60, on the fourth cause of action the sum of \$11.00, and on his fifth cause of action for the sum of \$187.99. That an Answer was filed by appellants and a Reply by the said Mike Stepovich. (Tr. pp. 222-227.) That on the 24th day of November, 1942, a motion was made by E. B. Collins, attorney for the said Mike Stepovich, for a voluntary nonsuit, which motion was granted and the said appellants were awarded their costs and disbursements to be taxed by the Clerk of the Court.

That a Writ of Attachment was issued on the 21st day of August, 1942, based upon the affidavit of the said Mike Stepovich (Tr. p. 79) and the personal property of appellants was attached by the United States Marshal for the Fourth Division of the Territory of Alaska as shown by appellants' Exhibit "G". (Tr. p. 167.)

That the said appellants left said mining claim and abandoned the same on or about the 21st day of August, 1942, and ceased their mining operations.

That on the 21st day of September, 1944, more than two years after said appellants abandoned said claim, the said Mike Stepovich died. That thereafter his wife, Vuka Radovich Stepovich, was appointed executrix of the estate of the said Mike Stepovich, Deceased, and qualified as such executrix and continued to act as such and is now acting as the executrix of the estate.

That after the appointment of the said Vuka Radovich Stepovich as such executrix the said appellants filed a claim with her as executrix of said estate on the 6th day of July, 1945, which said claim was disallowed by her as such executrix (Tr. p. 112) and which said claim stated that the said Mike Stepovich unlawfully ousted appellants from said mining claim and that they had spent certain sums of money in preparation for mining operations in the sum of \$6,791.29. No claim was made for the conversion of money or gold by the said Mike Stepovich and the claim was for anticipated profits in the sum of \$100,000.00 and for money expended in the sum of \$6,791.29.

That on the 15th day of October, 1945, appellants filed their Complaint herein and on the 20th day of October, 1947, filed their Second Amended Complaint, a copy of which is contained in the Transcript, p. 2.

That the case came on for trial and on the 12th day of January, 1949, Judgment was entered in favor of

the appellee and against the appellants. (Tr. pp. 23, 24, 25.)

That thereafter a Notice of Appeal was filed on the 6th day of April, 1949, more than 60 days after the entry of said Judgment.

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### POINTS AND AUTHORITIES.

The creditor's claim of appellants (Tr. p. 112) which was filed on the 6th day of July, 1945, and rejected by the Executrix of the estate of Mike Stepovich, Deceased, on the 16th day of July, 1945, was filed under the provisions of Section 61-13-4, Vol. 3, Alaska Compiled Laws Annotated, 1949.

The said section provides in part as follows:

“The District Court or the Judge thereof shall have power to hear and determine in a summary manner all demands against any estate agreeably to the provisions of this Chapter, and which have been so rejected by the executor or administrator, and shall cause a concise entry of the order of allowance or rejection to be made on the record, which order shall have the force and effect of a Judgment, from which an appeal may be taken as in ordinary cases; Provided, No Claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, judge, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant. No claim shall be allowed by the executor or administrator or

the District Court or judge which is barred by the statute of limitations.”

The above section 61-13-4 as well as most of the Alaska Code was copied from the laws of Oregon and part of the section above quoted has been construed by the Supreme Court of Oregon in the case of *Smith v. Pottratz*, 77 Pac. (2d) p. 436. In this case on page 439 the Court makes the following statement:

“It was incumbent on claimant to make a prima facie showing by corroborative testimony the extent and value of her alleged services; the amount and reasonable value of meat, vegetables, and other foodstuffs she claims to have furnished; the sums which were reasonable to allow her as fees and commissions; and the amount of money advanced by her. This, she has failed to do, except as to the item of \$100 referred to by Franklin G. Pottratz as having been agreed to by decedent and the item of \$18.95 for vegetables furnished in 1931 and called to the attention of claimant’s mother.”

There was no evidence offered at the trial of this case by appellants regarding any expenditures in any amount whatever in preparation for actual mining operations by appellants upon said mining claims. There was no evidence, competent or otherwise, of any kind tending to corroborate the testimony of appellants, Nick Kupoff or James Zukoev, as to them or any of the other appellants being ousted or ejected from the above described mining claim by Mike Stepovich, deceased, or by Pat O’Connor, Deputy United States Marshal, or by the United States Marshal for

the Fourth Division of the Territory of Alaska or any of his deputies. There was no evidence, competent or otherwise, that appellants suffered any damage of any kind on account of any act or acts of the said Mike Stepovich, deceased, or by the United States Marshal for the Fourth Division of the Territory of Alaska, or any of his deputies.

“In an action for unlawful attachment not brought upon the attachment bond, the plaintiff must allege and prove that the attachment was sued out maliciously and without probable cause.” *Mitchell v. Silver Lake Lodge* (29 Or. p. 294, 45 Pac. 798); (50 C.J. p. 622, Sec. 396); (6 C.J. p. 498, Sec. 1177.)

In the complaint filed by Mike Stepovich, deceased, against appellants, five causes of action were stated and the defendants admitted that they owed the money due under causes of action 2, 3, 4 and 5. One of the two appellants who appeared as witnesses admitted that he used the RD7 referred to in the first cause of action of said complaint (Tr. pp. 125-126), but denied that he owed anything for the use of said RD7 Caterpillar tractor. No competent testimony was offered to the effect that said accounts had not been assigned to the said Mike Stepovich, so it can not be said that the action was instituted without probable cause. There was no evidence that either Mike Stepovich or his attorney instructed the United States Marshal to oust or eject the appellants from the mining claim described in the reply. As a matter of fact, the appellants' own Exhibit “C” (Tr. p. 167) shows that Pat

O'Connor, deputy marshal, executed the Writ of Attachment by levying upon and taking into his possession personal property and appointing Emil S. Rylander as custodian. The Writ of Attachment introduced in evidence (Tr. p. 79) shows that the United States Marshal was merely instructed to attach and safely keep all of the property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand as above stated.

There is nothing in any of the authorities cited by appellants in their Brief to the effect that a Lessor cannot sue lessees and avail himself of the process of attachment and have the personal property of the lessees attached, unless the attachment is sued out maliciously and without probable cause.

In the case of *Dalton v. Kelsey* reported in 114 Pac. p. 464, we quote syllabus 2 as follows:

"Where plaintiff and defendant had an agreement whose express purpose was to settle and establish the respective rights of the parties to the water and ditches therein mentioned, an action by plaintiff for interfering with his rights thereunder, in that defendant entered upon the ditch upon his own land and diverted water so that it failed to reach the lands of plaintiff, but did not enter upon the plaintiff's land, is an action on the case, and is barred in two years under L. O. L. 8, subd. 1, and is not an action on the contract or for trespass, which are barred in six years by L. O. L. 6, subd. 1."

“Remote or speculative damages cannot be recovered for breach of contract”. (15 Am. Jur. p. 567, Sec. 153.)

*United States v. Behan* (110 U.S. p. 338). On page 334 of said opinion by the Supreme Court of the United States we find the following statement by the Court:

“The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses. The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consisted in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill, 69, they are ‘the direct and immediate fruits of the Contract,’ they are free from this objection; they are then ‘part and parcel of the contract itself, entering into and consti-



tuting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense."

"Actual damages must be actually proved and cannot be assumed as a legal inference from any facts which do not amount to actual proof of the facts." (15 Am. Jur. p. 795, Sec. 356.) (152 U.S. p. 200.)

In the case of *Osage Oil & Refining Co. v. Chandler et al.* (Fed. Rep. Vol. 287, p. 848) the Court on page 852 makes the following statement:

"In general, it is no doubt true that the loss for which a recovery may be had in an action against a wrongdoer must be the result of the wrong inflicted. The party complaining must show, not only that he has suffered the loss, but also that it would not have been incurred, but for the wrongful act of his adversary; and the amount of the loss is as much to be proved by the plaintiff as the fact of the loss. All this is common learning."

Appellants have sued in this case for actual or compensatory damages according to the claim filed and the contention of appellants in their Brief.

The action of appellants for torts complained of in the Complaint is barred by the statute of limitations.

(Sec. 55-2-7, Alaska Compiled Laws, Annotated, 1949, Vol. 3, p. 1686.)

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### **ARGUMENT.**

Concerning the Brief for Appellants, a part of their argument is based on an action for violation of contract and part for an action in tort. It is possible that the Complaint may be construed as both an action for breach of contract and for tort but there is a distinction to the authorities cited above, particularly in regard to proof for damages for violation of contract and damages for tort.

It seems to be the theory of appellants that Mike Stepovich, deceased, ejected appellants from the mining claim described in the lease for the sole purpose of being able to convert large sums of money which they claimed were contained in the dump and to extract from the claim rich and valuable gravels in order to prevent appellants from recovering the same; notwithstanding the fact that he was to receive under the lease one-third of the gross amount of gold extracted by appellants in their mining operations. In considering this theory of the case it is necessary first to consider plaintiffs' Exhibit "B". (Tr. p. 52.) According to this statement which was introduced by appellants they had failed to pay royalty on the clean-ups prior to the 2nd day of August, 1942, to Mike Stepovich in the sum of \$145.92; they had failed to pay for wood in the sum of \$111.00; they had failed to pay the July

payment for the Caterpillar under lease in the sum of \$250.00; they had failed to pay for groceries in the sum of \$43.03; they had failed to pay the royalty that was due on August 2, 1942, clean-up in the sum of \$432.00; they had failed to pay for the Caterpillar parts in the sum of \$45.65; and they had failed to pay for the bill paid by Mike Stepovich to Waechter Brothers in the sum of \$128.34. The total of these sums were paid in full on the 8th day of August, 1942, as shown by said Exhibit.

In considering the appellants' theory of the case it is also necessary to consider the creditor's claim which was filed by appellants (Tr. pp. 112, 113, 114, 115), which was filed on the 6th day of July, 1945, almost three years after the date of the alleged breach of contract. At no time during the lifetime of Mike Stepovich or up to and including the signing of this claim was any claim ever made according to the testimony in this case by appellants that they had suffered a loss of \$20,000.00 for gold which they pretended had been taken from the dump by Mike Stepovich. It seems peculiar to say the least that no claim or statement was ever made in regard to values in the dump of \$20,000.00 until the Complaint was filed in this action.

Furthermore in considering this theory of the case we must consider the Bill of Sale from Paul Drazenovich to James Zukoev, Nick Kupoff, Mike Kitoff and Nick Kobak dated August 6, 1942. (Tr. pp. 95, 96, 97, 98.) Paul Drazenovich started working on this claim shortly after the lease was signed and continued work-

ing until he sold his interest on August 6, 1942. According to the testimony of the two witnesses, Nick Kupoff and James Zukoev (Tr. pp. 48 and 129) they claimed to have found the rich pay streak on or about the 1st day of August, 1942. If there was such a pay streak, it seems strange that Paul Drazenovich would sell his interest for \$1.00 and other valuable considerations, and no other considerations other than the \$1.00 were claimed to have been paid by the appellants to the said Paul Drazenovich. If they had paid anything they would probably have alleged the amount as damages. Furthermore, if Mike Stepovich had instituted the action as claimed by them for the purpose of ousting appellants from the claim so that he could recover the ore which could be extracted, he made no attempt to extract the gravel and recover the gold which appellants claimed could have been recovered if they had not been ejected. The only way to determine a man's purpose in doing something if it depends upon his future acts is to show his future acts, and no claim was made that Mike Stepovich during his lifetime ever did any mining on this claim or extracted any gold therefrom.

There was nothing in the claim filed in regard to money contained in the dump in the sum of \$20,000.00. All that was claimed was expense money for preparing the shaft and claim for mining in the sum of \$6,791.29 and anticipated profits for the balance of the term of the lease in the sum of \$100,000.00. It is our contention that appellants are limited to the amounts claimed under the claim filed. They followed the pro-

cedure as prescribed by the Alaska Code in filing the claim and after the claim was disallowed they had a right under the Code to be heard by the District Court. From the ruling of the District Court they had a right to appeal to the Circuit Court of Appeals. What the Court should have done unless a jury was demanded was to have heard the matter and either allowed or disallowed the claim, but instead of that and notwithstanding our demurrer to the Second Amended Complaint, the Court proceeded to call a jury and hear the evidence. We are not questioning the right of appellants, however, to a jury trial, but we do insist that the motion for an instructed verdict was properly granted.

The evidence shows according to the testimony of Nick Kupoff (Tr. p. 57) and the statement (Tr. p. 52) shows that \$4,296.00 was extracted by appellants from said mining claim during their operations. The yardage of gravel extracted is not shown and no attempt was made by appellants during the trial of the case to show the number of yards by competent witnesses or to show the value per yard. Neither was any attempt made to show values of gravels contained in the claim. Attorney for appellants attempted to show values in drill holes in a ground adjacent to the claim which was, of course, properly excluded by the Court upon objection. The only evidence offered was by the two appellants who testified that they recovered a few pans that went as much as \$1.50 per pan, and from that evidence there and that evidence alone appellants expected the case to be submitted to the jury

and the jury allowed to guess as to the amount of yardage and as to the values per yard. This the Court refused to do.

In appellants' Brief the Court is blamed for not admitting incompetent, irrelevant and immaterial testimony and the claim is made that they were prevented from proving damages. As a matter of fact the Court did his best to inform appellants as to what was necessary to prove in order to make out a case for damages. During the trial the Court informed the attorneys that it was necessary for them to show the yardage, the value per yard and the cost of extracting the same in order to prove damages. (Tr. p. 91.)

The testimony of the only other witness besides the two appellants is the testimony of Joseph Ulmer and he testified that he had no knowledge as to the values contained in the gravels. He also attempted to testify by hearsay testimony as to drill holes in the vicinity of the claim in question, which testimony was properly excluded by the Court.

There was no evidence introduced which supports appellants' contention that Mike Stepovich filed the action against appellants for no other purpose than to collect what was due him for the use of his Caterpillar tractor and for the bills to the various merchants in Fairbanks which had been contracted by appellants and which they admitted were due and owing. The only fair and reasonable conclusion in regard to the assignments of these claims in view of the facts of the case is that Mike Stepovich felt a moral

responsibility to see that these merchants were paid, as the appellants were engaged in mining on the property of Mike Stepovich. If appellants had believed that after August 2 when the third clean-up was made and the 21st day of August, 1942, when the attachment was levied that they had taken out gravel containing \$20,000.00 in values that they would have done nothing to recover two-thirds of the \$20,000.00, and furthermore, if in a period of less than three weeks they could take out \$20,000.00 and have reason to believe that there was \$150,000.00 in the ground which they could have extracted, they would surely have done something during the summer of 1942 to assert their rights under the lease and Paul Drazenovich would not have sold his undivided one-fifth interest. Certainly Mike Stepovich if he had wanted to recover this money which they claim was in the ground would have employed miners to extract the gravel. If Mike Stepovich recovered the \$20,000.00 which they claim was in the dump there would have been some record in the bank in Fairbanks or at the mint because under the law in force and effect at the time, gold could not be sold and was required to be sent to the United States Mint, and evidence of such a fact was easily obtainable.

The Alaska statute herein referred to which was copied from the laws of Oregon which prevents a fraud of this kind being perpetrated upon the heirs of a decedent without some corroborating evidence should certainly be applied in a case of this kind. In the first place, no action for more than two years was taken

by appellants during the lifetime of the said Mike Stepovich. In the second place, the claim was filed and nothing was said about the conversion of any money by the said Mike Stepovich. No attempt was made to prove any actual damages and the claim itself was filed only for the anticipated profits and no actual or real attempt was made to show any profits.

As attorneys for the estate we can not waive the question presented by our motion to dismiss the appeal for the reason that the notice was not filed in the time prescribed by law. We contend that the motion for an instructed verdict was properly granted under the law and for lack of proof and corroborative evidence and for failure to bring the action within the time provided by law. We contend that the action as alleged is in tort and not for breach of contract.

For the reasons stated we believe that the decision of the District Court should be affirmed.

Dated, Fairbanks, Alaska,  
July 12, 1950.

Respectfully submitted,  
JULIEN A. HURLEY,  
MIKE STEPOVICH, JR.,  
*Attorneys for Appellee.*



Service of a copy of the foregoing Brief for Appellee admitted this 12th day of July, 1950.

WARREN A. TAYLOR,  
*Attorney for Appellants.*











IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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EUTH RADOMSKY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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HONORABLE JOHN C. BOWEN, *Judge*

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**BRIEF OF APPELLEE**

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VAUGHN E. EVANS,  
*Assistant United States Attorney*  
*Attorneys for Appellee.*

OFFICE AND POST OFFICE ADDRESS:  
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SEATTLE 4, WASHINGTON





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HONORABLE JOHN C. BOWEN, *Judge*

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**BRIEF OF APPELLEE**

---

**JURISDICTION**

In the present case Ruth Radomsky was regularly indicted, represented by counsel of her own choosing, tried and convicted of perjury in the District Court of the United States for the Western District of Washington, Northern Division and sen-

tenced to imprisonment for six months. A copy of the Indictment will be found on page 2 of the Transcript of the Record. The appellant is at liberty on \$1,500 cash bail pending this appeal. Jurisdiction is based upon Section 1621 of Title 18, U.S.C.

As alleged in the indictment, the testimony which is alleged to be false was given by the appellant after having been sworn as a witness to testify truly in the case of *United States v. Robert Olson*, then being tried before a jury in the United States District Court for the Western District of Washington, before the Honorable Lloyd L. Black, United States District Judge.

## STATEMENT OF THE CASE

On February 3, 1949, Robert Olson was on trial in the United States District Court for the Western District of Washington, for the crime of sending through the United States mails a communication wherein he threatened to kill his former wife, Leska Stack. Robert Olson took the stand and admitted having prepared the communication for mailing, but denied ever having placed the envelope containing the threat in an authorized depository for the United States mail. The envelope which contained the threatening communication was received by the addressee and was introduced in evidence at the Olson trial.

This envelope bore a postmark "Bremerton, Wash., January 14, 5:00 p. m. 1948." (Exhibit No. 3).

Ruth Radomsky, the appellant herein, after being called as a defense witness and properly administered an oath to testify truly, testified: That she and her husband were living next door to Mr. Olson during the month of January, 1948; that she kept Mr. Olson's house tidy and did his laundry for him; that on January 13, 1948, she entered Mr. Olson's house early in the morning just after Mr. Olson had left for work; that she entered Mr. Olson's house for the purpose of picking up his laundry; that upon entering the kitchen in Mr. Olson's house she saw a ready-stamped envelope addressed to Mrs. Leska Stack in a city in California lying on the kitchen table; that she picked up the envelope, read the address and turned it over to determine whether or not it was sealed; that upon finding that the envelope was addressed, sealed, properly stamped and ready for mailing, she ran out of the house to catch Mr. Olson for the purpose of giving him this envelope, thinking that he had intended to take it with him but had forgotten it; that upon reaching the bus stop where Mr. Olson would have boarded a bus, she found that Mr. Olson had already left; that she then walked over to the mail box by Baker's store and mailed this particular en-

velope in that mail box. (Exhibit No. 1, T.P. 138, 139).

Robert Olson was acquitted of the crime with which he was charged.

The appellant, Ruth Radomsky, was then indicted for perjury, the indictment alleging in effect that the testimony of Ruth Radomsky that she mailed the envelope in question in the mail box by Baker's store was false. At the trial in the present case the jury found appellant, Ruth Radomsky, guilty as charged in the indictment. The testimony adduced by the Government proved that it was impossible for an envelope bearing a postmark "Bremerton, Wash. January 14, 5:00 p. m., 1948" to have been deposited in the mail box by Baker's store in Bremerton, Washington.

The testimony adduced by the Government proved that:

1. The cancelling machine in the post office at Bremerton places a cancellation mark on the stamp on the envelope and prints on the face of the envelope the words "Bremerton, Wash." and the time and date of cancellation, and that this machine so cancels letters at the rate of two hundred to six hundred per minute (T.P. 140).



2. On the hour and half hour the time on the cancelling machine is set ahead one-half hour so that the time printed on the envelope by the cancelling machine is one half hour ahead, that is, at 4:30 p. m. the cancelling machine is set for 5:00 so that all letters cancelled between 4:30 and 5:00 p. m. bear a 5:00 p. m. postmark (T.P. 141).

3. Carriers bringing mail in from collection boxes, place the collected mail on the "facing table" where it is promptly run through the cancelling machine which is located adjacent to the facing table (T.P. 140, 158, 159, 173, Exhibit Nos. 11, 12, 13).

4. On occasions the cancelling machine will skip or miss an envelope. That such letters so skipped or missed are promptly recovered and recancelled with a maximum possible delay of one-half hour in the cancellation time (T.P. 166, 167, 175).

5. On January 13, and 14, 1948, the first collection from the mail box at Baker's store was made by truck carrier (T. P. 80). He left the post office at approximately 8:30 a. m. (T. P. 45, Exhibit Nos. 8 and 9) and returned with the mail which he had collected from the box at Baker's store at 9:49 a. m. (T.P. 44, 79, Exhibit No. 8) and 9:42 a. m. (T.P. 46, 79, Exhibit No. 9) respectively, on such dates, and promptly deposited this mail on the facing table (T.P.

80, 81), taking particular care to see that all mail so collected was placed on the facing table (T.P. 81), punching his time clock after so doing (T.P. 84).

6. All mail reaching the facing table by 10:00 a. m. on January 13, and 14, 1948, would be run through the cancelling machine and bear a postmark not later than 10:30 a. m. (T.P. 147, 173, 174).

7. On January 13, 1948, the foot carrier who collected the mail at Baker's store at approximately 11:45 a. m. (T.P. 100), the second and last collection of the day (T.P. 92, 99), returned to the post office at 12:34 p. m. (T.P. 97, Exhibit No. 7) and promptly deposited the mail so collected upon the facing table (T.P. 94), taking particular care to see that all mail so collected was left on the facing table (T.P. 55, 97, 104, 105).

8. All mail reaching the facing table between 12:30 and 1:30 p. m. on January 13, 1948, would bear a postmark as imprinted by the cancellation machine of not later than 1:30 p. m. (T.P. 148, 168, 174),

9. On January 14, 1948, the foot carrier who made the second and last collection for the day from the mail box at Baker's store at approximately noon (T.P. 109, 118) returned to the post office at 1:14 p. m. (T.P. 113) and promptly deposited the mail so

collected upon the facing table (T.P. 110), taking particular care to see that all mail so collected was placed on the facing table (T.P. 112).

10. Mail reaching the facing table between 1:00 and 1:30 p. m. on January 14, 1948, would bear a postmark as imprinted by the cancelling machine of not later than 2:00 p. m. (T.P. 150, 174).

11. There were no collections made from the mail box at Baker's store after the collection made by the foot carrier, who returned to the post office at 1:14 p. m. on January 14, until the morning of January 15, 1948, when the truck carrier would again make his collection (T.P. 53).

13. Ruth Radomsky's home and Baker's store are about two miles from the laundry where Ruth Radomsky works, and on January 13, and 14, 1948, Ruth Radomsky was at work at 7:45 a. m. at said laundry (T.P. 182, 183, Exhibit No. 18).

13. All mail in the Bremerton post office destined for California was sacked and out of the post office by 12:25 p. m. on January 13, and 14, 1948, respectively (T.P. 145, 148).

14. The volume of mail which passed through the Bremerton post office on January 13, and 14, 1948 was normal (T.P. 151).

15. There was a full crew working in the post office on January 13, and 14, 1948, but the volume of mail was not such that any employees were required to work overtime (T.P. 143, 151, 152, 153).

16. On January 13, and 14, 1948, the period between 10:00 a. m. and 11:00 a. m. was not a peak period with respect to the volume of mail being handled by the post office in Bremerton, Washington, but was a normal period, and the time between 12:30 and 1:30 p. m. on said dates was considered to be a slack period (T.P. 144, 147, 148, 169, 174).

17. Shortly after Robert Olson was indicted he bought a house and gave the same to appellant, Ruth Radomsky, and her husband (T.P. 185 through 189).

At the conclusion of the Government's case appellant moved for a judgment of acquittal. The trial Judge denied this motion. The appellant thereupon presented evidence in her own behalf. In addition to other witnesses, including Robert Olson, the appellant herself took the witness stand and testified on her own behalf (T.P. 207). The appellant reiterated her testimony that she mailed the envelope in question in the mail box by Baker's store on January 13, 1948, at 7:20 a. m. (T.P. 334, 335, 336, 360). The appellant further testified: That at the time she mailed the said envelope she had on a wash dress,

but made no mention of wearing a sweater or any other outer garment (T.P. 360); that at the time she took the letter from Mr. Olson's house to the mail box at Baker's store she was hurrying with her home work so that she could get to her job at the laundry on time (T.P. 356); that she immediately saw the envelope in question lying upon the table upon her entering the kitchen in Mr. Olson's house (T.P. 355, 356); that after examining the envelope she left the house to look for Mr. Olson; that she went out of the house and looked towards the alley and that she could see clearly out to the alley (T.P. 357), that she proceeded to the alley and could then see clearly all the way to the street (T.P. 358); that she proceeded to the street and then looked up towards the bus stop to see if Mr. Olson was there, but that he was not there (T.P. 359); that she then walked approximately 200 feet to the mail box at Baker's store and mailed the envelope in question (T.P. 359).

When the appellant was questioned on cross-examination as to whether or not it was dark in Olson's kitchen at 7:00 a. m. on January 13, 1948, she testified that it wouldn't be dark in the kitchen because of the large windows (T.P. 361, 362). The appellant was given every opportunity to say she turned on the lights but she refused so to do, and relied upon the light coming in the window to fur-

nish adequate light to see the envelope and read the address thereon (T.P. 355, 356, 361, 362).

(It is here called to the Court's attention that at 7:00 a. m. in the middle of January in the Western District of Washington, it is still very dark, and each juror, being a resident of the Western District of the Northern Division of Washington, knew such fact personally. The jurors likewise knew that in the middle of January it is too cold to be running around the neighborhood in a wash dress.)

At the conclusion of all the testimony the appellant's counsel did not again move for a judgment of acquittal.

### SPECIFICATIONS OF ERROR

The Specifications of Error upon which the appellant relies are set out on pages 8 and 9 of the appellant's brief.

The appellee will discuss the law dealing with the appellant's waiver of her right to challenge the sufficiency of the evidence by failing to make the proper motion at the conclusion of the evidence under Section I of the Argument herein.

Inasmuch as the first and second Specifications of Error both challenge the sufficiency of the evidence,

those two specifications will be discussed together under Section II of the Argument herein.

The third and fourth Specifications of Error set out in appellant's brief will be discussed under III and IV of the Argument herein.

## ARGUMENT

### I

By offering evidence in her defense after challenging the sufficiency of the evidence by moving for a judgment of acquittal at the close of the Government's case, the appellant has waived the right to rely upon that motion upon appeal. At the conclusion of all of the evidence, both the appellee's and the appellant's, the appellant did not again challenge the sufficiency of the evidence. By failing so to do, the appellant has waived the right to challenge the evidence at this time. The rule of law is well established by many rulings of the Ninth Circuit, the most recent case being *James M. Mosca v. United States*, (9 C.A.) 174 F. (2d) 448. Judge Mathews wrote the decision in which the following ruling is made:

"Specification 2 is that the court erred in denying a motion of appellant for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. There was only one mo-

tion of appellant for judgment of acquittal. That motion was made on September 24, 1947, at the close of the evidence offered by the Government. After its denial, appellant offered evidence, which the court received, whereupon all the evidence was closed, the case was argued and submitted to the jury, a verdict was returned, and the jury was discharged. Five days after the jury was discharged, appellant filed a so-called "renewal of motion for judgment of acquittal," apparently believing that he could thereby renew the motion of September 24, 1947. Appellant was mistaken. The provision in Rule 29 that "the motion may be renewed within 5 days after the jury is discharged" applies only to a motion made at the close of all the evidence. *In this case, there was no such motion. Appellant, by offering evidence, waived the motion of September 24, 1947. Hence that motion need not be considered. However, we have considered it and find no merit in it.*" (Italics ours).

The case of *United States v. Goldstein*, (2 C.A.) 168 F. (2d) 666, is cited in the Mosca decision. The Goldstein case was a perjury case. On page 670 of that decision the Court stated:

*"In other words, if the evidence is short as the prosecution leaves it, he may take advantage of that. But if he amplifies the record on the facts in attempting to make the case for acquittal he must assume the risk of having the prosecution's case bolstered in the process. The new rule does not attempt to make error in non-compliance with its term any different in respect to waiver than any other error would be."* (Italics ours).



And further on in the same opinion, the Court states:

“Consequently, the motion to dismiss made at the close of all the evidence is the only one now open for consideration.”

In the case at hand, there being no motion for acquittal challenging the sufficiency of the evidence at the close of all the evidence, this Court, in the light of its former decision, should not now consider a motion by the appellant for acquittal. In view of the fact that in the Mosca case the Court stated that it had considered the appellant's motion but found no merit in it, the Specifications of Error set out in the appellant's brief will be answered herein.

## II

Both the appellant's first and second Specification of Error challenge the legal sufficiency of the evidence adduced at the trial. These specifications of error will be discussed together since the points raised are in fact identical.

The appellant's real complaint in this appeal is that the Government did not produce an eye-witness who testified that he saw the appellant when she did not mail the envelope. The Government was faced with proving a negative fact. This was accomplished by proving a contrary state of facts, from that sworn

to by the appellant, which is absolutely incompatible with, and physically inconsistent with, the testimony of the appellant. The authorities which held that such evidence is legally sufficient to uphold a perjury conviction will be reviewed.

The case of *Hammer v. United States* 271 U.S. 620, is the latest case decided by the United States Supreme Court in which the legal sufficiency of the evidence in a perjury case was ruled upon. In that decision, on page 627, the Supreme Court announced the doctrine on this subject which is controlling upon the Federal Courts of the United States in the following language:

“The question is not the same as that arising in a prosecution for perjury where the defendant’s own acts, business transactions, documents or correspondence are brought forward to establish the falsity of his oath alleged as perjury. That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *U. S. vs. Wood*, 14 Pet. 430, 443. That case shows that the rule which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, *does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly, in some cases, documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony.*” (Italics ours).

It is doubtful that the Supreme Court could more clearly recognize the fact that perjury can be proved by evidence other than two eye-witnesses who actually saw the appellant do otherwise than what she testified. By such language the Supreme Court likewise recognizes that there are cases such as the one at hand in which the proof of the falsity of the statement is not susceptible of eyewitness testimony. In the case at hand it would be impossible to produce any witness who could testify that they saw the appellant not mail the envelope.

The appellant in her brief has also quoted that portion of the Hammer case which has been quoted herein. However, the appellant, realizing that this language in the Hammer case supported the Government's contention in the case at hand, has chosen to rewrite the decision of the United States Supreme Court under the guise of paraphrasing the language in the decision in the Hammer case. (See page 28 of appellant's brief).

It is the contention of the Government that the envelope, Exhibit No. 3, is documentary evidence emanating from the appellant. At the time the appellant testified that she mailed the envelope in the mail box by Baker's store, the envelope bore the postmark "Bremerton, Wash., 5:00 p. m., January 14,

1948.” The envelope then became the document claimed by the appellant to have emanated from her. This document, together with the attending circumstances surrounding her claiming it, was presented as evidence in the case at hand. The Government then corroborated this documentary evidence with six witnesses from the post office at Bremerton, Washington, who testified clearly, positively and directly that the appellant’s testimony that she deposited the envelope in the mail box by Baker’s store was false. The Government then produced testimony to show that Robert Olson had given the appellant a house as a bribe for her false testimony.

According to the rule laid down in the Hammer case this evidence is sufficient. We have in this case a document emanating from the accused, together with the attending circumstances. It was upon this theory which the trial Judge based his ruling denying the appellant’s motion for a judgment of acquittal in the conclusion of the Government’s case.

*Weiler v. United States*, 323 U.S. 606, has been decided since the Hammer case. The decision in the Weiler case is confined to the question of whether or not the trial Judge erred in denying the giving of a certain instruction. On Page 608 of the decision it is stated:

“In granting certiorari we limit review solely to the question of whether the trial Judge erred in denying this charge.”

The charge which the trial Judge refused to give in the Weiler case is set out on page 607 of the decision as follows:

“The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty.”

In the case at hand, the trial Judge gave the instruction which was refused by the trial Judge in the Weiler case in the exact language as above quoted (T.P. 378). The Supreme Court in the Weiler case then goes on to state that it is for the jury to determine if the falsity of testimony is properly proven:

“The Court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. *To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury.* Thus, to permit the judge finally to pass upon this ques-

tion would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. Cf. *Bruno v. United States*, 308 U.S. 287. The refusal of the trial judge to instruct the jury as requested was error.” (Italics ours).

In the case at hand, the jury, after having been properly instructed by the trial Judge, returned a verdict of guilty. The appellant now in effect complains that the jury did not properly apply the instructions, and asks this Court to substitute its judgment for that of the jury.

The manner in which the Government proved the crime of perjury in the case at hand is not new or novel. The identical type of proof was presented in the case of *United States v. Goldstein*, decided in May, 1948, and recorded in 168 F. (2d) 666. The entire concurring opinion by Judge Learned Hand is quoted:

“I agree with all that Judge Chase has said, and I also think that Belskin’s testimony, which was corroborated by Zeller’s testimony upon the defense, was “direct” testimony that certificates

five, six and seven had not been made out in 1941. *If 'A' swears that at a stated time there was an entry in a book and 'B' swears that he examined the book at that time, and that the entry was not there, I submit that 'B' has "directly" contradicted 'A'.* Belskin swore that when he saw the book only blank certificates followed the first four stubs. Had it been a solidly bound book that testimony would have "directly" contradicted Goldstein, who said that certificates five, six and seven had been made out in 1941. I do not understand that Goldstein disputes this; but he answers that, since the book was not solidly bound, but of the loose-leaf kind, it was possible that at the time Belskin saw it, certificates five, six, and seven may have been removed and were later replaced. That is theoretically possible but so would it be theoretically possible in the example I have put, that a solid book might be substituted for the occasion. We should not for that reason require two witnesses to the identity of the book; we should allow the jury to find that it was the identical book on any reliable evidence. So here, the evidence is that this was the stock book of Aetna Coated Fabrics, Inc., and the jury was free to infer that it had not been tampered with for the occasion, just as they might, had it been a solid book. *Were not some such latitude permissible in determining what is a "direct" contradiction, we should in effect insist upon two witnesses to every fact in a prosecution for perjury. I can find no warrant for any such dialectical extravagance, and I think that the verdict can stand as to all four certificates.*" (Italics ours).

In the Goldstein case, as in the case at hand, the appellant had testified to a positive fact. In order to prove the falsity of that fact the Government

proved the impossibility of such fact. In the Goldstein case the Government proved that if the defendant's testimony were true, the four stock certificates would have been in the book which the Government's witness had examined. In the case at hand, the Government proved that if the appellant's testimony were true, the envelope would have been in the mail box at Baker's store and would have been collected and postmarked many hours earlier than the postmark which the envelope bore. In the Goldstein case, the Government's evidence proved that the stock certificates were not in the book, and in the case at hand, the Government's witnesses proved that the envelope was not in the mail box. The cases are identical.

The appellant makes much ado in her brief about the possibility that the Government's witnesses were in error. The above quotation from the decision by Judge Hand in the Goldstein case well answers that argument. It is also pointed out that the jury heard all of the testimony and resolved the facts against the appellant. The appellant, by raising the question of the possibility of the Government's witnesses being mistaken, is actually asking this court to substitute its judgment for that of the jury.

The decision in the case of *United States v. Otto*, 54 F. (2d) 277 (2 C.A.), goes into the question of the



legal sufficiency of the evidence rather thoroughly. Much of that decision is quoted in the appellant's brief. However, the appellant has been very careful not to quote that portion of the decision which, as in the Hammer case, recognizes that there are cases where the falsity of the appellant's statement is not susceptible of proof by two eye-witnesses. The particular facts in the Otto case were susceptible of proof by eye-witnesses and, therefore, the decision dwells merely upon that subject. However, on page 279, Judge Chase states as follows:

*"People v. Doody*, 172 N.Y. 165, 64 N.E. 807, is an instance of a conviction for perjury based on testimony of a defendant that he did not remember at a subsequent trial facts to which he had testified several times before and concerning which his memory had recently been refreshed. In that case the subject-matter dealt with was that intangible something called memory, and the proof, while called circumstantial, was as direct as the subject-matter permitted. It is obvious that all knowledge, apart from that possessed by the person himself, as to what one does remember, lies in what common experience shows he ought under given circumstances to remember. Proof of the ultimate fact can rise no higher than the limitations of human nature will allow, and when as direct proof of a fact as that fact will ever, not in the particular instance alone, but always, permit, the general rule will not preclude a conviction when the presumption of innocence has been overcome and no reasonable doubt of guilt remains. See *Marvel v. State* (DelSup.) 131 A. 317 42 A.L.R. 1058."

And then goes on to say:

“Cases which hold that circumstantial evidence is never enough to support a conviction for perjury are illustrated by *Clayton vs. U. S.* 284 F. 537, and *Allen vs. U. S.* 194 F. 664. Without doubt, they are in the majority. *To the extent that whenever the subject-matter is in its nature susceptible of direct proof, we agree with them.*” (Italics ours).

The Otto case, therefore, upholds the Government's position in the case at hand by approving of the decision in the Marvel case which will be hereinafter discussed, as well as recognizing that perjury may be proven by other means than by two eye-witnesses.

The case of *Marvel v. State*, 131 Atlantic 317, is not binding or controlling upon this Court. The Marvel case is discussed herein since it is cited in the decision in the Otto case. In that case, the defendant testified in Probate Court that he was one of the testamentary witnesses to a will. The defendant had testified that on said day he had left Wilmington on a daily train at 6:52 p. m. and arrived at the home of his sister in Seaford at 10:00 o'clock p. m. At the home of his sister he met the testator who asked him to witness his will, and he did so. The defendant further testified that this took place between 10:00 and 12:00 p. m., and that he left on the night train,

leaving about 1:19 a. m. on the following morning and went back to Wilmington. The defendant was charged with having committed perjury in giving such testimony. To prove the falsity of the defendant's statement, the plaintiff produced the conductor of the train which left Wilmington at 6:52 p. m. on the date in question. The conductor testified that no tickets or mileage were collected, no cash fares were paid to Seaford from Wilmington on that train. It was further proved by the conductor of the train leaving Seaford at 1:19 a. m. on the following morning that the defendant was not in any of the coaches or sleepers on that train. Another witness for the plaintiff testified that he was the grandson of the testator, that he was living in his grandfather's house at night during the month in question, that he never went to bed before ten or half-past ten on any of the Friday nights during that particular month, and that he did not see the defendant on any of those nights in his grandfather's house. The Court, in its decision, after citing *United States v. Wood*, 10 L.Ed. 527, stated:

“The evidence, though largely circumstantial, is sufficient to sustain the conviction if in other respects the right of the defendant were duly protected.”

Thus the State proved a negative fact by positive and direct testimony, proving the impossibility of the testimony of the accused.

The Marvel case is likewise approved in the case, *Goins v. United States* 99 F. (2d) 147, (4 C.A.). Certiorari was applied for and denied in the Goins case. The following is quoted from the opinion:

“It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes. See *State v. Storey*, 148 Minn, 398, 182 N.W. 613, 15 A.L.R. 629; *Marvel v. State*, 3 W.W. Harr., Del., 110, 131 A. 317, 42 A.L.R. 1058; Wigmore on Evidence (2d ed.) Vol. 4, Sec. 2040. *The old “oath against oath” reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying. Boren v. United States*, 9 Cir., 144 F. 801, 806; *State v. Miller*, 24 W. Va. 802. And in any event it is difficult to see why there should be any greater reason for charging with respect to the necessity of corroboration in such cases than there is for charging on the necessity of corroborating the testimony of an accomplice, and on the duty of scrutinizing such testimony, as to which we have recently held that the giving of such charge is a matter resting in the sound discretion of the trial judge. *Hanks v. United States*, 4 Cir., 97 F. (2d) 309. Both go to the weight to be accorded testimony by the jury; and the ordinary rule is that charging as to such matters should rest in the sound discretion of the trial judge, upon whom rests the duty of guiding and directing the jury in their consideration of the case. Little good will be accomplished by prescribing rule of thumb instructions and holding it reversible error not to give them.” (Italics ours).

In the case of *Sharron v. United States*, 11 F. (2d) 689 (2 C.A.), the defendant had taken a pauper's oath to the effect that he did not have \$20.00 in order to be released from custody where he was being held in default of the payment of a \$750.00 fine. The evidence proved that the defendant had had \$550.00 in a bank which he withdrew by check, payable to his brother, and that after the defendant was released from custody his brother returned the money to him. There were no eye-witnesses to prove any part of the falsity of the defendant's statement under oath. Judge Hand stated in the decision:

"On the merits the case is perfectly clear. How there can be any doubt of the defendant's guilt, we cannot conceive. The proof from the checks and passbooks themselves, coupled with the oath and conviction to escape for which the oath was taken, make a patent case of perjury, sufficiently corroborated under the modern rule that documents will serve for corroboration. *Indeed, the old canonical necessity of two oaths has now very little life left.* The silly explanation of the defendant and his brother deserved less consideration from the jury than it got.

"The supposed errors in the conduct of the case are trivial; they would have been of no importance, had the defendant's guilt been less apparent, and in so plain a case they require no comment." (Italics ours).

The appellant relies heavily upon the case of *Phair v. United States*, 60 F. (2d) 953. The decision

in that case, although confining itself to particular facts of the case, recognizes the exception as set out in the Hammer case that perjury can be proved by means other than eye-witnesses, in the following language:

“Whereas, in this case reliance is made upon the testimony of the witnesses, \* \* \* ”

the two-witness rule applies.

Then after citing the Wood and Hammer cases, *supra*, the decision states:

“A living witness is no longer necessary to a conviction for perjury where the defendant’s own acts, business transactions, documents or correspondence show that his oath charged to be perjury is false.”

The envelope which the appellant testified she mailed bore a postmark dated and timed much later than the time which the envelope would have been so marked had her testimony been true. This is a document which the appellant claims sprang from her own acts and transactions. The appellant further testified that she read the address on the envelope before she mailed it by the light coming in from the windows (T.P. 362). This was supposed to have taken place at 7:00 a. m. in the middle of January in Bremerton, Washington. Both the Court and the jury are entitled to take judicial notice of the fact that it is still very dark at 7:00 a. m. in the middle of January in Bremerton, Washington. In other words, the ap-

pellant by her own testimony has proved her perjury.

In *Hart v. United States*, 131 F. (2d) 59 (9 C.A.), the defendant had testified under oath that she did not own a certain piece of property. It was charged that this testimony was false. The evidence showed that another party was the owner of the property and also the grantee in the deed, and further that the title insurance policy was in the name of the other party. The only evidence produced by the Government was that the defendant had furnished the purchase money. The Court stated on pages 62 and 63:

“It is true that the defendant furnished the purchase money, but the possibility that she made it some time in the future, claiming a resulting trust by reason thereof is not clear, convincing, and direct evidence of ownership as will support a verdict.

In the Hart case, the Court properly ruled that the evidence was not legally sufficient because in a legal sense a person furnishing the purchase money is not necessarily the owner when the deed is made to another party. The Hart case is therefore of no help in deciding the issues in the case at hand.

The appellant relies heavily upon *Allen v. United States*, 194, F. 664, (5 C.A.). On pages 12 and 13 of the appellant's brief the Allen case is discussed, and

a quotation is made from the decision in that case. The quotation thus used in the appellant's brief is a statement of the facts of the case and not a discussion of the law involved. In the Allen case the Court was considering the propriety of the instructions to the jury. The lower court had instructed the jury improperly without regard for any of the rules of evidence in perjury cases. In the case at hand, the jury was properly instructed. In the Allen case, the appellate court reversed the lower court on the ground that the instructions as given were prejudicial. The decision then goes on to discuss at length the evidence required in perjury cases, and says as follows on pages 667 and 668:

*"There is no question that there are cases in which neither the two witnesses of the earlier law nor the one witness with strong corroboration of the later are required to support a conviction. The courts and the text-writers have said that the oath of a living witness to the falsity of the statement in question is not indispensable —*

'(1) where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself with circumstances showing the corrupt intent; (2) in cases where the matter so sworn is contradicted by a public record, proved to have been well known to the prisoner when he took the oath, the oath only being proved to have been taken; and (3) in cases where the party is charged with taking an oath contrary to what he must have known neces-



sarily to be true, the falsehood being shown by his own letters relating to the fact sworn to, *or by any other written testimony existing and being found in his possession and which has been treated by him as containing the evidence of the fact recited in it.* *United States v. Wood*, 14 Pet. 440, 441, 10 L.Ed. 527; 1 Greenleaf on Evidence § 258.' (Italics ours).

*It may well be that a conviction might be sustained under still other circumstances, although the living witness was not forthcoming. If so, the evidence that the defendant had in fact foresworn himself must be direct and positive. If true, it must demonstrate the defendant's guilt. Such was the testimony held sufficient in People v. Doody, 172 N.Y. 165, 64 N.E. 807."* (Italics ours).

As stated from the above quotation, evidence which demonstrates the defendant's guilt is sufficient, although the living witness was not forthcoming. The quotation from Greenleaf on Evidence set out in the above decision, wherein *United States v. Wood* is referred to, further supports the Government's contention. In the case at hand, there was written testimony, the envelope, existing and in the possession of the appellant at the time she testified and it was treated by her as containing the evidence of the fact recited thereon. The appellant had the envelope in question in her hand and claimed it when she testified that that was the envelope she put in the mail box at Baker's store at 7:20 a. m. on Jan-

uary 13, 1948. That envelope bore the postmark "Bremerton, Wash., 5:00 p. m., January 14, 1948." The Government's evidence was clear and direct that that envelope could not have been placed in the mail box at Baker's store at the time the appellant so testified.

On page 12 of her brief, appellant seeks to distinguish the rules laid down in perjury cases arising from bankruptcy proceedings from those made in general perjury cases. The appellant cites as examples *United States v. Isaacson*, 59 F. (2d) 966 (C.C.A. 2), in explanation, with quotations citing *Kahn v. United States*, 214 F. 54, and *Schonfeld v. United States*, 277 F. 934, and *Hashagen v. United States*, 169 F. 396. In the *Isaacson* case, as especially noted in the *Kahn* case, the defendant was prosecuted under a special statute, being part of the Bankruptcy Act. This fact was noted in each of the above cases. The *Isaacson* case was an indictment for perjury for alleged false statements that the defendant did not remember certain facts. The *Isaacson* case held only that the uncorroborated oath of one individual against the oath of the defendant is not enough to prove that the defendant did or did not remember certain facts. It held in effect that an uncorroborated oath against oath is not sufficient in any case. It is for the defendant's protection from conviction on "oath against

oath" testimony that all the ancient and written rules of evidence have been made. The Court found actually that evidence sufficient for conviction, as outlined in *United States v. Wood*, supra, in a general perjury case is sufficient for conviction under the special Bankruptcy Act. In each of these cases the appellant sought to hold the Government to a higher degree of proof in bankruptcy cases than the Supreme Court has held to be necessary in *Hammer v. United States*, supra, and *United States v. Wood*, supra. In each case the Court applied the rules of evidence necessary to convict in perjury as set forth in the *Hammer* and *Wood* cases. In the case of *Jacobs v. United States*, 31 F. (2d) 568, (6 C.A.), the perjury, while committed in bankruptcy proceedings, was prosecuted as general perjury, and no distinction was made by the Appellate Court in relying on the sufficiency of the evidence. Certiorari was denied by the Supreme Court, 279 U.S. 869. The Government introduced no witnesses to testify to the falsity of the statement for which Jacobs was indicted. The Government relied on the character of the evidence referred to in *United States v. Wood* and *Hammer v. United States*. The defendant introduced evidence to produce the truth of the statement. The Court held that the jury had the right to accept the Government's evidence as against evidence which the appellant offered to

the contrary. The case is very similar to the Ruth Radomsky case, except that the corroborated testimony in the Ruth Radomsky is much stronger.

In the case of *Kahn v. United States*, 214 Fed. 54 (2 C.A.), the sufficiency of the evidence required in a perjury case is thoroughly discussed in the following language:

“However, the ancient rule of the common law requiring two witnesses to contradict the defendant’s oath has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt.

The rule is stated in Cyc. vol. 30, page 1452, as follows:

‘Positive and direct evidence is absolutely necessary in a perjury case. Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by the defendant on trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him.’

In *U. S. v. Wood*, 14 Pet. 430, 10 L.Ed. 527, the court reached the conclusion that where the contradiction comes directly from the defendant perjury may be proved without the aid of a living witness. In other words, the court held that rule is not an arbitrary one and where the probative force of the testimony is equal to that of two

witnesses or to one witness corroborated, it is sufficient.

In *Hashagen v. United States*, 169 Fed. 396, at page 399, 94 C.C.A. 618 at page 621, the court, speaking of the old rule, says:

‘But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other.’

In the case of *People v. Doody*, 172 N.Y. 165, 64, N.E. 897, the Court of Appeals of New York upheld a conviction of perjury where the defendant swore that he did not remember certain material facts when the testimony showed that he did remember them.”

After quoting the above rules as applied to general perjury, the Court especially said that lesser evidence than above quoted would be sufficient to convict under Section 29 (b) (2) of the Bankruptcy Act.

In the case of *Gordon v. United States*, 5 F. (2d) 943 (8 C.A.), the defendant was indicted for perjury for a false statement before a Referee in Bankruptcy. The defendant testified in his own behalf. No assertion was made that less evidence was required in such case than is required to prove any other type of perjury. The defendant appealed from a denial of a directed verdict on the ground that the two-witness

rule or one-witness rule with corroboration is indispensable to sustain conviction of perjury, and further that the evidence must be incompatible with innocence and incapable of explanation on any other reasonable hypothesis than guilt. The Court on page 945 affirmed the conviction and held that:

“Clear and direct testimony of one or more witnesses, or the testimony of one witness and convincing corroborating circumstances, *or indubitable facts absolutely incompatible with the truth of the testimony charged to be false, may be ample to sustain a verdict for perjury. United States v. Wood*, 39 U.S. (14 Pet.) 428, 437, 438, 439, 440, 441, 442, 10 L.Ed. 527; *Hashagen v. United States*, 169 F. 396, 399, 94 C.C.A. 618; *Kahn v. United States*, 214 F. 54, 56, 130 C.C.A. 494.” (Italics ours).

The appellant seeks to discredit the evidence produced in this case by the Government by quoting numerous abstract definitions of direct testimony and circumstantial evidence. These definitions were made when considering particular cases and should not be construed as covering every conceivable set of facts. The cases decided by the Federal Court system in general support the following statement in 48 Corpus Juris, at page 902, under Section 169:

“Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by accused, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely

incompatible with his evidence, or physically inconsistent with the facts so testified to by him.”

The case of *Smith v. United States*, 169 F. (2d) 118, further supports the Government’s contention that the above quoted statement from Corpus Juris is in fact the rule followed in the Federal Court system. The Court states on page 121:

“Appellant is right in his contention that there can be no lawful conviction in a perjury case when an answer of the defendant, under oath, to a question propounded to him is ‘literally accurate, technically responsive, or legally truthful.’ It is also true that, to sustain a conviction, it must be shown by clear, convincing and direct evidence to *a moral certainty and beyond a reasonable doubt* that the defendant committed willful and corrupt perjury. The following cases, cited by appellant, sustain the contention. *Hart v. United States*, 9 Cir., 131 F. (2d) 59, 61; *Fotie v. United States*, 8 Cir., 137 F. (2d) 831, 840; *United States v. Slutzky*, 3 Cir., 79 F. (2d) 504, 505; *Allen v. United States*, 4 Cir., 194 F. 664, 668. It should be observed, however, that in *Hart v. United States*, supra, and in *United States v. Slutzky*, supra, convictions on the first count of the respective perjury indictments were reversed; but convictions of perjury on the second count were confirmed in both cases.” (Italics ours).

As has been explained in the citations quoted by the appellant in her brief as well as the citations herein quoted, the purpose of the two-witness rule, together with its modifications, is to protect a defend-

ant from being convicted for perjury where the evidence is one oath against one oath. It cannot be questioned that the practical aspect of the rule is to protect the defendant from being convicted of perjury solely upon the testimony of one witness when that witness might be testifying falsely, thus leaving the jury with the burden of determining who is testifying to the truth without the assistance of any corroborating circumstances. In the case at hand, there was the oath of six witnesses pitted against the oath of the defendant. All six of these witnesses from the Post Office at Bremerton would have to have testified falsely before the appellant's testimony could be true. The testimony of these six witnesses, of course, is exclusive and in addition to the document emanating from the appellant, as well as the evidence of the bribe given the appellant by Olson.

In addition to the testimony of the six postal employees and the document emanating from the appellant herself, there is present in this case, the testimony of the appellant who took the stand in her own defense. It is a well recognized rule that where a defendant takes the stand in a perjury case, the jury may consider his demeanor and manner of testifying, as well as the substance of his testimony in determining whether or not he is telling the truth. Syllabus No. 12 in the case of *People v. Todd*, 49 P.

• .



(2d) 611 (Cal.), reads as follows:

“Where jury had found against party accused of perjury upon her claim, based entirely upon her own testimony, that falsity of statements had been result of an honest mistake, District Court of Appeals could not interfere with such conclusion since jury was sole judge of the credibility of witnesses and facts of case.”

In the case of *Boren v. United States*, 144 Fed. 801, (9 C.A.) the court stated on page 806:

“In addition to this there is the fact that the plaintiff in error testified at length in his own behalf whereby the jury had the opportunity to observe the demeanor and manner of testifying. In such demeanor and manner of testifying as well as in the substance of the testimony as it appears in the record, the jury may have found corroboration of the testimony of the witnesses for the United States.”

### III.

The third specification of error as set out in the appellant's brief is to the effect that the trial judge erred in denying the defendant's motion for a new trial.

The United States Supreme Court has repeatedly held that the overruling of a motion for a new trial is not assignable as error. In *Wheeler v. United States*, 159 U.S. 523, 40 L.Ed. 244, the United States Supreme Court stated:

“Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U. S. 57; *Holder v. United States*, 150 U. S. 91; *Blitz v. United States*, 153 U.S. 308.”

The *Wheeler* case just quoted was an appeal from a murder conviction where the defendant had been sentenced to hang. See also *Klune v. United States*, 159 U.S. 590, 40 L.Ed. 269, and *Lueders v. United States*, 210 Fed. 419 (9 C.A.), for similar holdings.

#### IV.

The fourth specification of error as set out in the appellant's brief is that the trial judge erred in entering a judgment and sentence upon the verdict returned by the jury.

The appellant having failed to challenge the sufficiency of the evidence at the conclusion of all of the evidence by a motion for a judgment of acquittal, and the court having fully considered the merits of such a motion the same as though the same had been made at the proper time and ruled that there was sufficient evidence to justify the verdict, the trial judge committed no error in entering the judgment and sentence.

#### CONCLUSION

The appellant in this case does not decry her

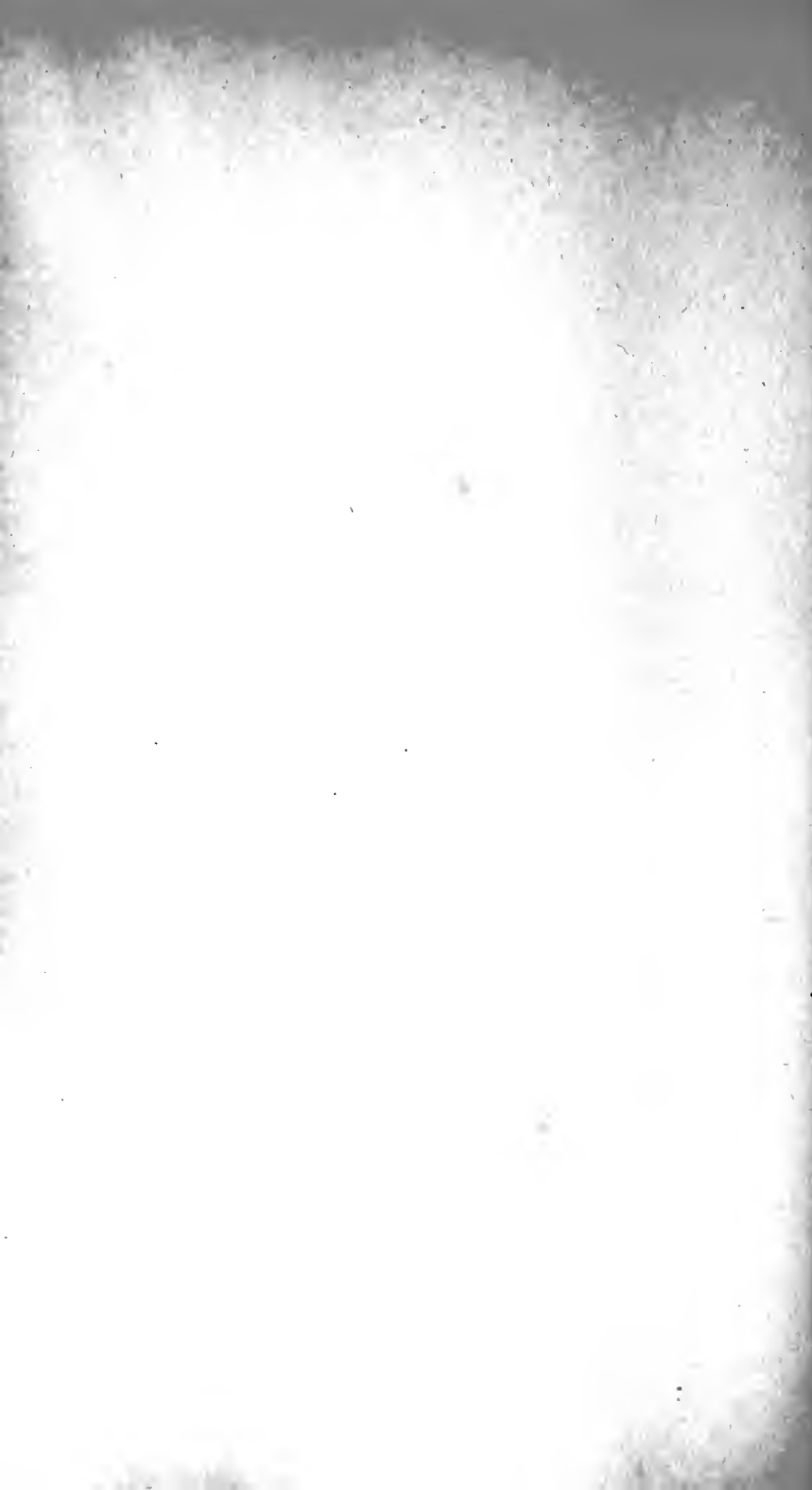
innocence but complains of a technicality that she was not convicted upon the testimony of two eye witnesses or one eye witness and corroborating testimony. It is conceded that there were no eye witnesses to testify that they saw the appellant when she did not mail the envelope. It is contended by the appellee that the proof of the falsity of appellant's statement is not susceptible to proof by the testimony of eye witnesses. As has heretofore been pointed out, the defendant was convicted upon a document emanating from herself, upon the testimony of six employees from the Post Office at Bremerton testifying to the impossibility of the truth of her testimony, upon the testimony showing she had received a bribe for her testimony, and also upon the testimony of the appellant herself wherein she made statements absolutely incompatible with physical facts.

In concluding, it is respectfully submitted that the trial judge made no errors in the conduct of the trial and that the defendant was properly convicted upon legally sufficient evidence.

Respectfully submitted,

J. CHARLES DENNIS  
*United States Attorney*

VAUGHN E. EVANS  
*Assistant United States Attorney*



**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

NORMAN W. MOSHER,

*Appellant,*

vs.

Diesel Boat FEARLESS, her motor, tackle, apparel,  
furniture, etc.,

LAURENCE E. TATE and HENRY L. CASTNER,  
claimants,

*Appellees.*

---

**BRIEF OF APPELLEES**

---

Upon Appeal from the United States District Court for  
the District of Oregon.

---

**FILED**

NOV 9 1949

WOOD, MATTHIESSEN & WOOD,  
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**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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NORMAN W. MOSHER,

*Appellant,*

vs.

Diesel Boat FEARLESS, her motor, tackle, apparel,  
furniture, etc.,

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*Appellees.*

---

**BRIEF OF APPELLEES**

---

Upon Appeal from the United States District Court for  
the District of Oregon.

---

**STATEMENT OF THE CASE**

This case is brought upon the basis of a seaman's libel in rem for wages. Wilbert B. Mosher, one of the libelant's assignors, was engaged by the owners to act as master of the FEARLESS upon a fishing venture. Libelant and his remaining assignors were employed by Captain Mosher. The crew came aboard the boat in Portland on November 3, 1948, and commenced work

in getting ready to fish. Thereafter the boat was beset by much mechanical difficulty until shortly after January 1, 1949, when the crew proceeded from Astoria to sea to fish. Again engine trouble ensued, and the boat was taken to Westport, Washington. There, on January 10, 1949, the employment agreement was terminated.

A libel in rem was filed against the FEARLESS, and the boat taken into custody of the Court on March 28, 1949. No service of the monition by publication was ever made. Because the claimants were unable to post a stipulation, the cause came on for trial on April 7, 1949.

At the trial libelant contended, as he does in his appeal, that he and his assignors are entitled to wages for the time spent working upon the FEARLESS and for the time spent waiting for repair work to be done on the engines. The claimants contended that the hiring of the crew was on the basis that the boat would be fished on lay shares, so that the crew was not entitled to wages, only a share of the catch.

On April 9, 1949, the Trial Court found for the libelant in the total sum of \$288.00 and ordered that the FEARLESS be released from the Marshal's custody unless he was given adequate security. The Marshal then demanded security from the libelant to save the Marshal harmless from any claims or expenses arising while the vessel was in his custody. When such security was not furnished, the Marshal released the FEARLESS from custody.

Thereafter, the claimants tendered to libelant's proctor the full sum awarded by the Court, together with the amount claimed as costs. This tender was refused, and the money was paid into the registry of the Court.

Although Appellant's Assignments of Error (Abs. 42) are seven in number, in his brief (p. 4) appellant states that there is but one broad error. The error charged is that the Court did not award appellant a large enough sum. The only issue therefore on this appeal is whether the evidence supports the Trial Court finding determining the sums due appellant.

## ARGUMENT

### Point I

#### Appellant's Assignment of Error.

The point to be borne in mind throughout the consideration of this appeal is that this is not a case of articulated seamen but one involving a fishing venture. Historically, men have fished on a lay basis with the boat receiving its share and the captain and crew receiving their share of the catch. If fishing is good, the crew is well paid; if fishing is poor, the returns for both parties are poor. In that sense these fishing boats operate with their crews as joint venturers or partners.

When Captain Mosher was engaged to operate the FEARLESS, it was upon a lay basis as set forth by the Union Agreement—40% of the net receipts from fishing to the boat and 60% to the crew (Tr. 16, 76).

In addition the captain was to be given 10% of the boat's share for his additional services. This is shown by the testimony of Tate (Tr. 131) and Castner (Tr. 175). When libelant first recounted the circumstances of the hiring of the crew, the foregoing was the extent of his testimony (Tr. 16). Later, on rebuttal, for the first time (Tr. 239) he attempted to make out an agreement to pay wages. The same is true of Everett Mosh-er's statement (Tr. 251, 252). The Trial Court found from this evidence that the crew was "employed to operate the FEARLESS in the fishing trade upon a lay basis, subject to the terms of a working agreement of the Otter Trawlers Union, Local 50, International Fishermen and Allied Workers of America" (Abs. 36, Finding 2).

Appellant's argument seeks to avoid the main purpose of the Union Agreement and the majority of its provisions—which portion sets forth the share basis of the fishing venture.

(1) Appellant contends in Point 1 of his summary (Ap. Brief, 34) that this Union Agreement (Libelant's Ex. 2) requires the payment of \$1.50 per hour for any work done after one day by a member of the crew promised a fishing chance, but released without a legitimate cause and without opportunity to fish. In support of this he relies on Clause 11c of the Union Agreement.

This entire paragraph of the Union Agreement should be considered:

"11. The crew is to build and repair the nets during the fishing season and perform such work as is necessary for the upkeep and preservation of the net and gear without compensation. However, if any crew member does not show up to perform all of such work or has not provided any experienced man in his place, he shall be charged \$1.50 per hour, which shall be paid to the man taking his place. If there is no man taking his place, then the sum collected from absent member shall be divided equally among the crew members performing the work.

" . . . .

"(c) Any work done on otter trawls after one day by any member promised a fishing chance, who is released without legitimate cause and does not have the opportunity to fish with said otter trawler seine, shall be paid at the rate prescribed above, \$1.50 per hour."

This paragraph requires the crew to build, repair and maintain the nets and gear without compensation. If a crew member is released under 11(c), he was to be paid at the rate of \$1.50 per hour for work on the *nets and gear* on the *otter trawler*. This clause does not cover any work on the hull or engines but only work on the gear.

There was no agreement, written or oral, that the Moshers were to work on anything but the nets and gear. There was no agreement to compensate them for time spent waiting.

(2) In Point 2 appellant states the beginning dates of the work by libelant and each assignor. This is not disputed.

(3) In Point 3 appellant claims that it is not disputed that claimants discharged the Moshers at Westport January 10, 1949. This is disputed. The facts show that the employment was terminated by mutual consent.

First, when Captain Mosher called Castner he told Castner that "We are through" (Tr. 191). Then, when Tate went to Westport to get the boat, believing the crew was unwilling to continue, he was told by Norman and Everett Mosher that they had figured on taking the boat back to the Columbia River and quitting it (Tr. 149). This is confirmed by the testimony of George Hippert (Tr. 220).

In his brief appellant claims the boat was ready to return to sea at this time, that they were ready to go and that they did not do so solely because they were discharged. If, as they say, the boat was ready to go fishing before Tate arrived, why did the Moshers not go? Why should they wait for Tate unless they were quitting the vessel?

(4) In Point 4 appellant states that none of the Moshers gave the owners any legitimate cause for discharge. As pointed out under (3) above, this employment was terminated by mutual consent. There was no discharge, even though there may have been ample reasons for the owners to discharge the Moshers.

(5) Appellant states in Point 5 that there is no doubt that the Moshers did not get a substantial fishing

chance. This is apparently an effort to show compliance with all of the provisions of Clause 11c of the Union Agreement which reads "does not have an opportunity to fish." Whether or not libelant had an opportunity to fish within the terms of this agreement is not, as appellant agrees, an issue before this Court, although, in fact, the boat did go fishing.

(6) Appellant argues in Point 6 that the Moshers were detained in the service of the boat and gave their whole business time from November 3, 1948, to January 10, 1949. Reverting to the fact that this was a fishing venture, all parties expected all income to come from the proceeds of the sale of the catch. Surely appellant would not claim wages for the time spent waiting because the weather was unsuitable for fishing or because the market price of fish made it unprofitable to go to sea. Then, why should they make a claim for time spent waiting in getting parts and repairing the engines?

As a matter of fact, when the reduction gear broke down, Tate "told them that it would be fine if they could go up town and get a job and work for a while. If the boys could work for a while while the boat was laid up, because we would have no use for them on the boat, because the boat wasn't going anyplace until it was repaired" (Tr. 138). There was nothing which compelled the Moshers to stay on the boat at any time. They could have left at any time (Tr. 166).

(7) Appellant urges that there is no contradiction that their services were worth \$1.50 per hour each, with an additional \$8.00 per day for Captain Mosher. The testimony of libelant and his assignors on the reasonable value of their services merely stated their opinion of the value. There is no testimony of other wages paid for comparable work and, indeed, no such testimony could have been produced because these fishing boats do not operate on a wage basis but upon a lay basis.

Particularly is it true of the testimony of Captain Mosher. Had there been a going rate for wages for fish boat captains, a man with the experience in fishing of Captain Mosher would have known of it and would have produced it in evidence. Nowhere does Captain Mosher give any basis for his computation of \$20.00 per day. It does not appear in any alleged oral or written agreement; it does not appear as the custom of the trade; and it does not appear as a going rate.

From this evidence and from observing the witnesses and their demeanor, the Trial Court concluded that the sum per day of \$10.00 to one Mosher, \$8.00 to a second and \$6.00 to a third was a reasonable sum to be allowed them. This is set forth in Finding No. 7 (Abs. p. 36).

(8) In Point 8 appellant contends that the Moshers actually did each job listed in his brief. There is considerable question and conflict of testimony on what the Moshers actually did do. They testified to a great deal of work on the nets and gear and on the engines. How-



ever, Captain Randall, a witness for the claimants, who heard all of the Moshers' testimony, stated that three men could have done all of the work that was done by the Moshers, or that had to be done, in about seven or eight days (Tr. 214), and Captain Randall has had extensive experience as a fisherman and boat builder.

There is no doubt that the Moshers did work on the fishing equipment. They also did some work in cleaning and freeing deck machinery and cleaning the hull. However, they did little work on the engines. While the boat was at Westerlund's at Portland, the engine work was done by Westerlund and Fairbanks Morse men (Tr. 128, 129). When she was at Ilwaco, the work was done by Elmer Cook, a machinist, and assisted by Tate (Tr. 139). The work at Astoria, getting the engines in final tune, was done by Castner and an experienced mechanic named Rasmussen (Tr. 190, 209).

(9) Appellant claims in his Point 9 that the only issue going to the merits about which there was controversy was whether the Moshers actually worked the time they claimed to work.

The owners testified that when either of them was on the boat all that the Moshers were doing was sitting around talking and drinking coffee (Tr. 151, 165). The Moshers kept no record of their time and kept no log (Tr. 65, 103, 117). Although Captain Mosher said he had a log covering the past twelve years, it was not introduced to substantiate his claim for hours worked (Tr. 103).

Thus, the evidence was not clear as to the time spent by libelant or any assignor. It was all based upon the speculation of the interested parties making the guess (Tr. 54, 97, 110-111, 116, 120). The Trial Court found that the time spent by the Moshers was twelve days and awarded compensation based thereon (Finding No. 7, Abs. 36).

(10) In Point 10 appellant claims as a matter of law that the Moshers are entitled to the full amount of their claimed wages. No authorities are cited on this matter of law. The extent and value of their services to the vessel have been discussed under the foregoing points. From this conflicting evidence, the Trial Court found that the Moshers were entitled to \$288.00. They are entitled to no more.

(11) In his concluding Point 11 appellant "thinks" he should recover the amount alleged in his libel, less \$197.00 cash advanced. This conclusion was not the conclusion of the trial judge.

## **Point II**

**The Court's Findings are supported by ample evidence.**

As has been discussed previously the testimony on the value and extent of the Moshers' services was con-

flicting. Because the crew was hired on a lay basis, the owners at the trial and upon this appeal contend that the libelant was entitled to nothing but the crew's share of any catch.

The Trial Court found that the employment was on a lay basis in the fishing trade, subject to the terms of the Union Agreement (Finding No. 2, Abs. 36). This is supported by the testimony of Tate and Castner and even by the Moshers (Tr. 161, 76, 131, 175).

The Trial Court found that this employment was terminated on January 10, 1949. This also was supported by the testimony of Tate and Castner and confirmed by Hippert (Tr. 149, 191, 220).

In fact the only finding appellant objects to is No. 7 which states the number of days worked and the amount of the compensation. This was in the sum of \$288.00. This sum was arrived at by taking into consideration the groceries furnished the crew by the owners (Tr. 228), the cash advances made (Tr. 228), the terms of the Union Agreement (Libelant's Exhibit 2), the conflicting evidence on the terms of the hiring, the conflicting evidence on the value and extent of the Moshers' work and the conflicting evidence on the termination of the agreement.

### Point III

**Where the Trial Court's Findings and Conclusions are amply supported by the evidence, the case should be affirmed.**

Where the trial judge saw all of the witnesses, heard their testimony and had an opportunity of passing upon their credibility and accuracy, his Findings of Fact and Conclusions of Law should not be disturbed.

This is a familiar proposition of law which requires little citation and is peculiarly applicable to this appeal. The cases are uniform that a Finding of Fact in admiralty is a finality unless "clearly erroneous". Among the recent decisions of this Court upon that point are *United States v. Wilhite* (C.C.A. 9, 1947), 163 F. (2d) 825; *Vileski v. Pacific Atlantic Steamship Company* (C.C.A. 9, 1947), 163 F. (2d) 553; *Rogers v. Pacific Atlantic Steamship Company* (C.C.A. 9, 1948), 170 F. (2d) 30. See also, *Petterson Lighterage & Towing Corporation v. N. Y. Central Railway Company* (C.C.A. 2, 1942), 126 F. (2d) 992.

The libelant has argued the evidence produced at the trial in the major portion of his brief. As has been pointed out above, the evidence was conflicting. All of the testimony was presented orally to the Trial Court, with the usual opportunity to observe the demeanor of the parties and witnesses. Clearly under the foregoing decisions this is a case which should be affirmed.

## CONCLUSION

Appellees respectfully urge that the judgment and decree of the District Court be affirmed. The evidence is ample and satisfactory that the work performed by the appellant and his assignors was of the reasonable value of \$288.00, as found by the Court. The Trial Court was right; it should be affirmed.

Respectfully submitted,

WOOD, MATTHIESSEN & WOOD,  
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1310 Yeon Building,  
Portland, Oregon,  
Proctors for Appellees.



**No. 12371**

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**United States  
Court of Appeals  
For the Ninth Circuit.**

---

**F. E. THIBODO,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Transcript of Record**

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**Appeal from the United States District Court  
for the Southern District of California  
Southern Division.**

FILED

NOV 29 1940

PAUL P. O'BRIEN





No. 12371

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United States  
Court of Appeals  
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F. E. THIBODO,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern  
District of California, Southern Division

No. 1030-SD

F. E. THIBODO,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

A Sovereign Power,

Defendant.

### COMPLAINT

(Injuries and relief incident to the Government depriving a citizen of his property in violation of constitutional right, and for declaratory relief.)

F. E. Thibodo, plaintiff, by George W. Crouch, his attorney, and complains of the United States of America, a sovereign power and for cause of action alleges:

#### I.

That the plaintiff is a native born citizen of the United States of America, and is a resident of the County of San Diego, State of California. That the real property, with respect to which vested rights of lien are hereinafter alleged in favor of the plaintiff, is situate in the said County of San Diego.

#### II.

That under and by virtue of Title 28, Section 1346, subdivision [2\*] (2) of the Judicial Code of

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\* Page numbering appearing at top of page of original certified Transcript of Record.

the United States jurisdiction is duly conferred upon the District Court of the United States, by virtue of the duly enacted laws of the Congress of the United States, covering any court action against the United States in an amount not exceeding \$10,000 founded upon the Constitution of the United States, or upon any express or implied contract with the United States. That under and by virtue of the said Acts of Congress jurisdiction is conferred upon such United States District Court to grant declaratory relief coextensive with the limits of its jurisdiction otherwise. That by such laws it is likewise provided that any action seeking an adjudication respecting liens upon real estate must be brought in the District where such property is situate.

That the Fifth Amendment to the Constitution of the United States provides in part that no person shall be deprived of his property without due process of law; nor shall private property be taken for public use, without just compensation.

### III.

That ever since the 24th day of August, 1931, the plaintiff was, and now is, the owner of certain street improvement bonds, duly issued in pursuance of the laws of the State of California, for the construction of a sanitary sewer in the City of National City, County of San Diego, California, and which, with the interest and penalties thereon, constitute a first lien upon the various lots and

parcels of land hereinafter more particularly set forth in subsequent paragraphs hereof. That each and every lot thereof is a part of the lands taken by the United States of America in attempted pursuance of law, and the right of condemnation accorded thereby, under a certain action instituted in the United States District Court for this District, and which bears No. 230-SD, and which has proceeded to judgment, and [3] the payment by the Government of the awards thereby imposed, all without service of process upon this plaintiff, any appearance by him, any compensation to him, or any adjudication respecting it, or any other act savoring of due process of law. That the said bonds have at all times since their issuance constituted a right of property, of substantial value, in favor of this plaintiff.

#### IV.

That on the 24th day of August, 1931, the City Treasurer of the City of National City, California, acting under and by virtue of an Act of the Legislature of the State of California, entitled, "An Act to provide for work upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities or of which the municipality has possession and the right of use under the provisions of Section fourteen of article one of the constitution, and for establishing and changing the grades of any of such streets, avenues, lanes, alleys,



courts, places, sidewalks, properties or rights of way, and providing for the issuance and payment of street improvement bonds, to represent certain assessments for the cost thereof, and providing a method for the payment of such bonds," approved April 7th, 1911, and acts amendatory thereof,—duly made, issued and delivered to this plaintiff his street improvement bonds for the various amounts and as against the various lots as hereinafter particularized.

That said bonds were designated as "Series No. 41," and by their terms provided for the payment of interest at the rate of seven per cent, payable semi-annually at the office of said City Treasurer, the first payment to be on January 2nd, 1932, and thereafter on the first days of July and January of each year during the term thereof, all as represented by coupons attached [4] to each bond.

That said bonds extended over a period of nine years next succeeding the second day of January next succeeding the 15th day of the next November following their date. That each of said bonds covered a particularly numbered assessment therefore duly given, made and issued by the Street Superintendent of said City of National City, and which remained unpaid at the date of the issuance of said bonds.

That the principal of said bonds was payable at the office of the City Treasurer of the City of National City in ten annual installments on the

second day of January of each year, the first of which was January 2nd, 1932. That said bonds described each particupar parcel of land as hereinafter alleged and described, and said bonds by their terms provided, in pursuance of the provisions of said "Improvement Act of 1911," that the amount thereof, with interest and penalties, be, and the same shall remain a lien on the lands described therein until paid. That said bonds were otherwise in full accordance with the said Act of the said Legislature.

That nothing has ever been paid on said bonds, either of principal or interest.

## V.

That the following is a description of said bonds with relation to the lands described therein, and which is arranged in such manner that it indicates which one of the parcels of land it pertains to as such parcels are numbered and set forth by the Government in its complaint in the said action No. 172-SD. That opposite the bond numbers, under appropriate headings, are shown the original principal amounts of each bond.

Gov't. Parcel	Property description	Bond Nos.	Amount
1	Lot 1 Block 123, including vacated alley		\$112.92
1	Lots 2 to 9 inclusive Blk 123, with vacated alley	419 to 426, inc.	} each for \$43.43
1	Lots 14 to 21, inc. Blk. 123, with vacated alley	427 to 434, inc.	
1	Lot 22, Blk 123, with vacated alley	435	\$8139

Gov't. Parcel	Property description	Bond Nos.	Amount
2	Lots 1 to 9, inc. Blk 124 with vacated alley	348 to 356 inc. }	each for \$43.43
2	Lot 10 Blk. 124, with vacated alley	357	\$112.92
2	Lot 13 Blk. 124 with vacated alley	358	81.39
2	Lot 14 to 22 inc. Blk 124 with vacated alley	359 to 367, inc. }	each for \$31.31
3	Lot 1 Blk. 125 with vacated alley	269	\$112.92
3	Lot 2 to 9 inc. Blk 125, with vacated alley	270 to 278, inc. }	each for \$43.43
3	Lot 13 Blk. 125, with vacated alley	279	\$57.33
3	Lots 14 to 21 inc. Blk 125 with vacated alley	280 to 287, inc. }	each for \$31.31
3	Lot 22 Blk. 125 with vacated alley	288	\$81.39
4	Lots 1 to 9 inc. Blk 126— with vacated alley	189 to 197 inc. }	each for \$43.43
4	Lot 10 Blk. 126, with vacated alley	198	\$112.92
4	Lot 13 Blk. 126 with vacated alley	199	81.39
4	Lots 14 to 21 inc. Blk. 126 with vacated alley	200 to 207 inc. }	each for \$31.31
4	Lot 22 Blk. 126, with vacated alley	208	57.33
8	Lot 22 Blk. 133	347	39.36
11	Lot 2 to 10, inc. Blk 135 with vacated alley	455 to 463 }	each for
11	Lots 13 to 21 inc. Blk 135, with vacated alley	464 to 472 inc. }	each for \$43.43

All according to the Map of National City No. 348, filed in the office of the county recorder of San Diego County, Calif.

## VI.

That by virtue of the terms of said "Improvement Act of 1911," it is provided that upon the

default of any payment of principal or interest upon said bonds, the City Treasurer shall immediately add a penalty of five per cent to the amount thereof, and on the first day of each and every month following such default shall add an additional penalty of one per cent upon such defaulted amount. That said Act further provides that the City on whose behalf such city treasurer issues such bonds shall be entitled to one-half of such first penalty of five per cent, and that all other penalties shall be paid to the owner of such bonds.

That the City of National City has no interest in any penalties with respect to the bonds here involved for the reason that the United States Government, in said action No. 172-SD made full settlement with such City and secured their acquittance.

That should it not follow by operation of law that under principles of fair compensation the plaintiff would not be [7] entitled to collect penalties as against the Government, then the plaintiff waives all such penalties.

## VII.

That the amount involved in this action is less than the sum of \$10,000.

## VIII.

That each of the said lots, as described in Paragraph V hereof, are, and were as of the date the Government took possession as hereinafter alleged,

of greater value than the total amount then due upon its respective bond.

### IX.

That on or about the 9th day of February, 1943, the United States of America, in pursuance of the provisions of the various Acts of Congress in that behalf, brought an action in this District Court of the United States, bearing file No. 172-SD, to condemn various parcels of land in the City of National City, California, for the Government for the use of the United States Navy, to acquire the fee simple title thereto, and to adjudge the just compensation for the taking thereof. That on or about said date the duly constituted authority of the United States filed in said action their Declaration of Taking, and the Court made its order of possession in pursuance thereof. That thereupon the defendant entered into possession and has ever since been in possession thereof. That the property described in the bonds of the plaintiff, as set forth in Paragraph V hereof, lies within the area of the property that the defendant so too and so holds possession thereof. That plaintiff was neither a party to said action 172-SD, nor was he served with summons. That no provision has been made for the payment of the bonds of the plaintiff, and no adjudication has been made respecting it. That plaintiff has never received any compensation for such bonds. That the defendant refuses to pay plaintiff anything in lieu [8] thereof.

## X.

That there has never been any other action or proceeding on the part of the United States to determine the rights of property of this plaintiff.

Wherefore plaintiff prays:

1. For judgment against the United States of America for a sum of money amounting to the total of the principal sums of the bonds described in this complaint with interest thereon at the rate of seven per cent per annum from August 24th, 1931 to February 9th, 1943, the date the Government entered into possession.

2. That it be decreed that each bond constitutes a separate lien upon the property described therein, and shall remain a lien until it be paid.

3. That a declaration be made of the rights of the parties.

4. For costs, and for such general, other and further relief as may follow in the due course of law.

/s/ GEORGE W. CROUCH,  
Attorney for Plaintiff. [9]

State of California,  
County of San Diego—ss.

F. E. Thibodo being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as

to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ F. E. THIBODO.

Subscribed and sworn to before me this 19th day of November, 1948.

[Seal] /s/ ELSIE H. CRENSHAW,

Notary Public in and for the County of San Diego,  
State of California.

My commission expires Mar. 31, 1951.

Copy received.

[Endorsed]: Filed Nov. 23, 1948. [10]

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[Title of District Court and Cause.]

JOINT AND CONSOLIDATED MOTION TO  
DISMISS, MOTION TO STRIKE, AND  
MOTION FOR MORE DEFINITE STATE-  
MENT

Motion To Dismiss

Comes Now the United States of America, defendant herein, and moves the Court to dismiss the action on the grounds that:

1—The Complaint fails to state a claim against the United States.

2—The Complaint fails to state a claim upon which relief can be granted.

3—This Court lacks jurisdiction of the subject matter of this action, in that the amount actually in controversy is in excess of \$10,000.00 as more clearly appears from the certified statement of W. C. Van Sant, City Treasurer of the City of National City, marked Exhibit “A” and attached hereto.

4—There is another action, to wit, Case No. 172-SD Civil, being United States of America v. 123.466 Acres of Land, etc., jurisdiction over which still remains in this District Court, and pursuant to which any claim available to plaintiff herein by reason of the aforesaid condemnation proceedings can be raised and adjudicated. [11]

Plaintiff herein had actual and constructive notice of this cause such as to put him upon inquiry, and his failure to make such inquiry and pursue his remedy prior to the date of filing of this action constitute laches and estop him from now so doing.

5—Any cause of action available to plaintiff herein pursuant to Section 1346(a(2)) of the Judicial Code is barred by the Federal Statute of Limitations pertaining to said claims.

6—Any cause of action available to plaintiff herein is barred by the Statute of Limitations of the State of California which affect the cause herein.

### Motion To Strike

Subject to the ruling of this Court upon the foregoing Motion to Dismiss and reserving all rights



thereunder, defendant moves the Court to strike from the Complaint the following portions thereof, and for the reasons set out herein:

1—Paragraph I through X, inclusive, and each and every one of them, in that the mentioned paragraphs of said Complaint:

(a) Are so vague, ambiguous and of such sweeping generalization that defendant is wholly unable to respond or answer or otherwise plead thereto.

(b) Do not set forth with particularity facts upon which, under any theory, plaintiff can invoke the aid and protection of the Constitution or laws of the United States, and upon which relief responsive thereto could be granted.

(c) Do not establish the jurisdictional basis for said action in that nowhere does plaintiff cite the constitutional provisions or other laws of the United States which establish his right to bring this particular action, in this particular form, or the duties and obligations of the United States arising thereunder, or to sue in this forum.

(d) Are indefinite, ambiguous, unintelligible and uncertain for the reasons aforesaid.

2—Paragraph II, lines 14 to 17, inclusive, page 2, in that the same is merely expository, there is no statement or claim within the Complaint that said [12] Complaint is predicated thereon, and for the further reason that citation of Title 28, Section 1346, Subdivision 2, indicates the Complaint is

based upon a claim independent of the aforesaid condemnation proceedings, and for the further reason that said statement is immaterial, redundant, and surplusage.

3—The whole of Paragraph III of said Complaint, and each and every allegation therein, in that said paragraph is redundant and surplusage, does not state ultimate facts upon which to predicate a claim against the United States, and states legal conclusions.

4—The whole of Paragraph IV, and each and every allegation contained therein, because said paragraph is immaterial, redundant and inpertinent as to any issues between the parties, and, taken in context, states no basis for a claim against the United States.

5—The whole of Paragraph VI, and each and every allegation contained therein, because said paragraph is immaterial, redundant and inpertinent as to any issues between the parties, and, taken in context, states no basis for a claim against the United States.

6—The whole of Paragraph VII in that the amount actually in controversy is in excess of \$10,000.00.

7—The whole of Paragraph VIII of the Complaint, and each and every allegation therein contained, for the reasons that said paragraph is a legal conclusion, is not a pleading of ultimate facts,

is immaterial and surplusage, and, taken in context, states no basis for a claim against the United States.

8—The whole of Paragraph IX, and each and every allegation therein contained, for the reason that they are redundant and immaterial to the claim raised by plaintiff herein, and that said paragraph, and each and every allegation therein, nowhere states or indicates that plaintiff herein has performed each and every act necessary to secure his rights in the condemnation proceedings, the failure of recognition of which might serve as a basis for a claim against the United States under Title 28, Sec. 1346 of the Judicial Code.

9—The whole of Paragraph X, and each and every allegation therein contained, for the reason that the same is immaterial and impertinent to any issues herein, and, taken in context, furnishes no basis for a claim against the United States [13] pursuant to Title 28, Section 1346 of the Judicial Code.

#### Motion For A More Definite Statement

Subject to the ruling of this Court upon the Motion to Dismiss and Motion to Strike, and reserving all rights thereunder, defendant moves the Court to require that plaintiff herein make his Complaint more definite in the following particulars:

1—Let him state the particular clause of the Constitution of the United States, or other law of the United States, which serves as a basis for his Complaint, in addition to the jurisdictional requirements of Title 28, Sec. 1346, Subdivision 2 thereof.

2—Let him state whether said cause is based upon express or implied contract with the United States, and if so based, let him state the facts upon which he predicates such a claim.

3—Let him state whether payment for the bonds set forth in Paragraph IV of his Complaint was ever demanded, and by whom, and upon what date.

4—Let him state the value as claimed by him, of each of the lands, set forth in Paragraph V of his Complaint, and referred to in Paragraph VIII thereof.

5—Let him state when, if ever, demand was made of defendant herein, upon whom said demand was served, and where, when, and by whom such refusal to pay was made, all as is alleged by him in Paragraph IX.

6—Let him state whether he has ever sought compensation in the condemnation proceedings referred to in Paragraph IX, and, if so, when and where, and by whom denial thereof was made.

7—Let him state the proceedings instituted by him to recover his just compensation pursuant to said condemnation proceeding, or if none, such pro-

ceedings as may have been instituted by him to secure restitution of those amounts alleged to have been improperly paid to other persons entitled to a proportionate share of said compensation arising out of the aforesaid condemnation proceedings. [14]

Dated this 24th day of February, 1949.

JAMES M. CARTER,  
United States Attorney.

By /s/ COLLMAN E. YUDELSON,  
Special Attorney, Lands Division Department of  
Justice,

Attorneys for Defendant.

EXHIBIT "A"

February 7, 1949.

To Whom it May Concern:

I, C. W. Vansant, City Treasurer of City of National City, California, hereby certify that the attached is a correct statement of the amount of money that would have been required to cancel the Improvement Bonds listed thereon on February 9th, 1943.

/s/ C. W. VANSANT.

State of California,  
County of San Diego,  
City of National City—ss.

On this 7th day of February, 1949, before me, Frank W. Rogers City Clerk in and for City of National City, County of San Diego, State of California, residing therein, duly commissioned and

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City of National City, County of San Diego, the day and year in this certificate first above written.

[Seal]        /s/ FRANK W. ROGERS,  
                 City Clerk of the  
                 City of National City. [16]

Series #41 Bond No.	Col. A Original Amount	Col. B Penalties	Col. C Interest	Col. D Total Due Feb. 9, 1943
419	\$43.43	\$49.81	\$14.78	\$108.02
420	43.43	49.81	14.78	108.02
421	43.43	49.81	14.78	108.02
422	43.43	49.81	14.78	108.02
423	43.43	49.81	14.78	108.02
424	43.43	49.81	14.78	108.02
425	43.43	49.81	14.78	108.02
426	43.43	49.81	14.78	108.02
427	31.31	35.93	10.66	77.90
428	31.31	35.93	10.66	77.90
429	31.31	35.93	10.66	77.90
430	31.31	35.93	10.66	77.90
431	31.31	35.93	10.66	77.90
432	31.31	35.93	10.66	77.90
433	31.31	35.93	10.66	77.90
434	31.31	35.93	10.66	77.90
435	81.39	93.42	27.70	202.51
347	35.91	37.39	11.32	84.62
348	43.43	49.81	14.78	108.02
349	43.43	49.81	14.78	108.02
350	43.43	49.81	14.78	108.02
351	43.43	49.81	14.78	108.02
352	43.43	49.81	14.78	108.02
353	43.43	49.81	14.78	108.02
354	43.43	49.81	14.78	108.02

Series #41 Bond No.	Col. A Original Amount	Col. B Penalties	Col. C Interest	Col. D Total Due Feb. 9, 1943
355	\$ 43.43	\$ 49.81	\$ 14.78	\$108.02
356	43.43	49.81	14.78	108.02
357	112.92	129.54	38.45	280.91
358	81.39	93.43	27.70	202.51
359	31.31	35.93	10.66	77.90
360	31.31	35.93	10.66	77.90
361	31.31	35.93	10.66	77.90
362	31.31	35.93	10.66	77.90
363	31.31	35.93	10.66	77.90
364	31.31	35.93	10.66	77.90
365	31.31	35.93	10.66	77.90
366	31.31	35.93	10.66	77.90
367	57.33	65.79	19.52	142.64
269	112.92	129.54	38.45	280.91
270	43.43	49.81	14.78	108.02
271	43.43	49.81	14.78	108.02
272	43.43	49.81	14.78	108.02
273	43.43	49.81	14.78	108.02
274	43.43	49.81	14.78	108.02
275	43.43	49.81	14.78	108.02
276	43.43	49.81	14.78	108.02
277	43.43	49.81	14.78	108.02
278	43.43	49.81	14.78	108.02
279	57.33	65.79	19.52	142.64
280	31.31	35.93	10.66	77.90
281	31.31	35.93	10.66	77.90
282	31.31	35.93	10.66	77.90
283	31.31	35.93	10.66	77.90
284	31.31	35.93	10.66	77.90
285	31.31	35.93	10.66	77.90
286	31.31	35.93	10.66	77.90
287	31.31	35.93	10.66	77.90
288	81.39	93.42	27.70	202.51
189	43.43	49.81	14.78	108.02
190	43.43	49.81	14.78	108.02
191	43.43	49.81	14.78	108.02
192	43.43	49.81	14.78	108.02
193	43.43	49.81	14.78	108.02
194	43.43	49.81	14.78	108.02
195	43.43	49.81	14.78	108.02
196	43.43	49.81	14.78	108.02
197	43.43	49.81	14.78	108.02
198	112.92	129.54	38.45	280.91
199	81.39	93.42	27.70	202.51
200	31.31	35.93	10.66	77.90
201	31.31	35.93	10.66	77.90

Series #41 Bond No.	Col. A Original Amount	Col. B Penalties	Col. C Interest	Col. D Total Due Feb. 9, 1943
202	\$ 31.31	\$ 35.93	\$ 10.66	\$ 77.90
203	31.31	35.93	10.66	77.90
204	31.31	35.93	10.66	77.90
205	31.31	35.93	10.66	77.90
206	31.31	35.93	10.66	77.90
207	31.31	35.93	10.66	77.90
208	57.33	65.79	19.52	142.64
455	43.43	49.81	14.78	108.02
456	43.43	49.81	14.78	108.02
457	43.43	49.81	14.78	108.02
458	43.43	49.81	14.78	108.02
459	43.43	49.81	14.78	108.02
460	43.43	49.81	14.78	108.02
461	43.43	49.81	14.78	108.02
462	43.43	49.81	14.78	108.02
463	43.43	49.81	14.78	108.02
464	43.43	49.81	14.78	108.02
465	43.43	49.81	14.78	108.02
466	43.43	49.81	14.78	108.02
467	43.43	49.81	14.78	108.02
468	43.43	49.81	14.78	108.02
469	43.43	49.81	14.78	108.02
470	43.43	49.81	14.78	108.02
471	43.43	49.81	14.78	108.02
472	43.43	49.81	14.78	108.02
418	112.92	129.54	38.45	280.91

(Lot 1 Blk. 123)

(Par. 12 S. 1012)

Total	4,288.85	4,916.29	1,458.94	10,664.08
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[Endorsed]: Filed Feb. 24, 1949. [18]

[Title of District Court and Cause.]

## JUDGMENT AND ORDER OF DISMISSAL

The above entitled cause came on regularly for hearing and argument on the 7th day of June, 1949, on the defendant's Joint and Consolidated Motions to Dismiss to Strike, and for a More Definite State-



ment, and there appearing on behalf of the plaintiff, F. E. Thibodo, his attorney of record, George W. Crouch, and on behalf of the defendant, United States of America, one of its attorneys of record, Collman E. Yudelsohn, and the said matter then being orally argued and presented upon said oral arguments and upon the Memoranda of Points and Authorities submitted herein, and the case being then fully submitted to the Court,

### The Court Finds:

#### I.

That plaintiff herein, although a proper, was not a necessary party to the condemnation proceedings affecting the real property which is the subject matter of the instant action, and which was involved in case [19] No. 172-SD Civil, entitled "United States of America v. 107.28 Acres of Land in the City of San Diego, etc. et al.," and there was no necessity for the United States to serve plaintiff herein or to make him a party-defendant in the aforesaid condemnation proceeding; and that, accordingly, plaintiff herein was not entitled to be heard in the matter of the determination of just compensation for the condemnation and taking of the real property in said condemnation proceeding.

#### II.

That the bond register maintained in the office of the County Treasurer, as provided for by the Public Improvement Act of 1911, and acts amenda-

tory thereof, and the California Street and Highway Code, Section 6400, et. seq., is not such a public record as constitutes either actual or constructive notice to the United States of America of the existence of the claims of this complainant arising out of the ownership of Public Improvement Street Lien Bonds.

### III.

That the Complaint herein does not state facts sufficient to constitute a cause of action against the United States of America.

It Is Accordingly Ordered And Adjudged that the defendant's Motion to Dismiss be granted and the Complaint herein is dismissed without leave to the complainant thereof to plead further.

Dated: This 20th day of June, 1949.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

Presented by:

JAMES M. CARTER,  
United States Attorney.

By /s/ COLLMAN E. YUDELSON,  
Special Attorney, Lands Division Department of  
Justice.

Judgment entered June 21, 1949.

Docketed June 21, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1949. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFF TO  
THE UNITED STATES COURT OF AP-  
PEALS, FOR THE NINTH CIRCUIT

To the United States of America, Defendant, and  
to its attorneys, James M. Carter, United States  
Attorney, and Collman E. Yudelso, Special  
Attorney, Lands Division, Department of Jus-  
tice:

Take Notice that the Plaintiff, F. E. Thibodo,  
does, on this 27th day of July, 1949, hereby appeal  
to the United States Court of Appeals, for the  
Ninth Circuit, from the judgment of dismissal, in  
favor of the defendant, and against plaintiff, en-  
tered on June 21, 1949, in judgment book 14, at  
page 489, and from the whole of such judgment,  
wherein it was ordered and decreed that the plain-  
tiff's complaint be dismissed, without leave to the  
complainant to further plead.

/s/ GEORGE W. CROUCH,  
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 27, 1949. [21]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING  
THE TIME FOR,

- (1) The filing of the record on appeal and the docketing of the appeal. (2) The filing of the designations of the portion of the record and proceedings to be contained in the record on appeal. (3) The designation by the appellant of the points on which he intends to rely on the appeal.

Whereas notice of appeal from the judgment in the above entitled action was duly served and filed on July 27th, 1949, and counsel are of the opinion that there is extraneous matter in the normally [23] constituted record on appeal that ought to be eliminated, and that there are other things that can be provided that will assist in the clarification and presentation of the issues upon the appeal.

It is understood that such stipulation on the part of the Government must first be approved by the Appellate Division at Washington; that such body usually requires a reporter's transcript of the proceedings had; that the Court Reporter Henry Dewing, who officiated in this case, is still away on vacation. Therefore, in order that there be sufficient time for the parties to enter into such a stipulation, the extensions of time hereinafter provided are agreed to. The parties report to the Court that such tentative stipulation between counsel for the plain-

tiff and Government counsel at Los Angeles has been arrived at. Hence it is now stipulated:

1. That the record on appeal as provided by Rules 75 and 76 may be filed with the United States Court of Appeals, for the Ninth Circuit, and there docketed within ninety (90) days from July 27, 1949.

2. That the appellant may within 45 days from July 27, 1949, serve upon the appellee and file with this District Court a designation of the portions of the record, and the proceedings, to be contained in the record on appeal, plus any reporters transcript.

3. That within 55 days from July 27, 1949, the appellee may likewise serve and file a designation of any additional portion of the record and proceedings to be included in the record on appeal.

4. That within 45 days from July 27, 1949, the appellant shall serve and file a concise statement of the points on which he intends to rely upon appeal.

5. That should counsel for appellant at any time conclude that the negotiations leading to such stipulation for diminution [24] of the record will prove to be fruitless, then he shall, from thence forward, be free to proceed as though this stipulation had never been entered into, but nevertheless being en-

titled to the benefit of the delays, that have in the meantime ensued.

Dated July 29, 1949.

/s/ GEORGE W. CROUCH,

Attorney for Plaintiff.

United States of America,

By JAMES M. CARTER,

United States Attorney,

By /s/ JOSEPH F. McPHERSON,

Defendant.

### ORDER

The extensions of time, as above stipulated, are hereby ordered.

Dated August 1, 1949.

/s/ LEON R. YANKWICH,

U. S. District Judge.

Copy received.

[Endorsed]: Filed Aug. 1, 1949. [25]

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[Title of District Court and Cause.]

### STATEMENT OF THE POINTS ON WHICH THE APPELLANT, F. E. THIBODO, IN- TENDS TO RELY, ON THE APPEAL.

The Appellant, F. E. Thibodo, will, on the appeal, rely on the following points:

1. That the action of the trial court in granting the Government's motion to dismiss, and entering a judgment of dismissal without leave to further plead,

results in depriving the plaintiff of property, without due process of law, and takes from him his private property for public use without compensation, in violation of the provisions therefor guaranteed to all persons by the Fifth Amendment to the Constitution of the United States.

2. That the finding of the trial court, as set forth in said judgment, that the plaintiff was not a necessary party to a condemnation proceeding to acquire the property covered by the lien of his bonds, and not entitled to be heard in the matter of the determination of just compensation for the taking of such property, [26] is contrary to law.

3. That the finding of the trial court, as set forth in said judgment, that the bond records of the City Treasurer, as provided by the Improvement Act of 1911, are not such public records as constitute actual or constructive notice to the United States, of the existence, or ownership of street improvement bonds, is contrary to law, as specifically provided.

4. That the finding of the trial court, as set forth in said judgment, that the plaintiff's complaint does not state facts sufficient to constitute a cause of action against the Government, is contrary to law.

5. That the reporter's transcript of the hearing upon the motion to dismiss, discloses that the Court's determination was in part based upon the

assumption that the plaintiff's action is a suit under the Tort Claims Act, whereas it is in truth a suit upon implied contract, arising under the Fifth Amendment to the Constitution, and one with respect to which the District Court has jurisdiction under Title 28 Section 1346-2 of the Judicial Code.

6. That the said judgment of dismissal, in all its important findings and decrees, is contrary to law.

Respectfully submitted,

/s/ GEORGE W. CROUCH,  
Attorney for Plaintiff  
and Appellant.

Dated Sept. 6, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 7, 1949. [27]

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[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Please prepare the record on appeal in the above entitled action. Such record shall include:

1. The Plaintiff's complaint.
2. The defendant's motion to dismiss, entitled "joint and consolidated motion to dismiss, motion to strike, and motion for more definite statement."
3. The "judgment and order of dismissal."



4. The Court reporter's transcript of all that transpired at the hearing of the defendant's motion to dismiss, held at San Diego, California, on June 7, 1949.

5. Your certificate to the effect that no hearing took place other than that of June 7, 1949, that no witnesses were sworn or testified, no documentary evidence was received or filed, and that [29] there is no stipulation on file respecting either admissions or evidence.

6. The notice of appeal with its date of filing.

7. The stipulation entered into extending the time for (1) the filing of the record on appeal and the docketing of the appeal, (2) the filing of the designations of the portion of the record and proceedings to be contained in the record on appeal, and (3) the filing by the appellant of a concise statement of the points on which he intends to rely upon appeal.

8. The statement of the points on which the appellant intends to rely upon appeal.

9. The designations filed by the parties as to the matter to be included in the record.

Respectfully submitted,

/s/ GEORGE W. CROUCH,

Attorney for Appellant.

Dated Sept. 7, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 7, 1949. [30]

[Title of District Court and Cause.]

APPELLEE'S COUNTER-DESIGNATION  
OF THE RECORD ON APPEAL

To the Clerk of the above entitled Court:

Comes Now the United States of America, appellee, and by way of a counter-designation and as an addition to appellant's designation of the contents of record on appeal, designates the following additional portion of the record, to-wit:

1. Exhibit "A" which is annexed to the Motion to Dismiss, entitled "Joint and Consolidated Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement," and which Exhibit "A" consists of a statement over the signature of C. W. Vansant, City Treasurer of the City of National City, California, dated February 7, 1949, and two pages of five columns of figures.

2. This counter-designation.

Dated: September 21, 1949.

JAMES M. CARTER,  
United States Attorney.

By /s/ IRL D. BRETT,  
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 21, 1949. [32]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain the original Complaint; Joint and Consolidated Motion to Dismiss, Motion to Strike and Motion for More Definite Statement; Judgment and Order of Dismissal; Notice of Appeal; Stipulation and Order Extending Time for Filing Record and Docketing Appeal etc.; Statement of Points on Which Appellant Intends to Rely on Appeal; Appellant's Designation of Contents of Record on Appeal and Appellee's Counter-Designation of the Record on Appeal which, together with Reporter's Transcript of Proceedings on June 7, 1949 consisting of pages 1 to 11, inclusive, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that no hearing took place, other than that on June 7, 1949; that no witnesses were sworn or testified; no documentary evidence was received or filed and there is no stipulation on file respecting either admissions or evidence.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of September, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy. [34]

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United States District Court in and for the Southern  
District of California, Southern Division

No. 1030-SD Civil

F. E. THIBODO,

Plaintiff,

vs.

UNITED STATES OF AMERICA, A Sovereign  
Power,

Defendant.

Honorable Leon R. Yankwich,  
Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

San Diego, California  
Tuesday, June 7, 1949

APPEARANCES

For the Plaintiff:

GEO. W. CROUCH, Esq.  
2125 Oak Street,  
Los Angeles 7, California.

For the Defendant:

COLLMAN E. YUDELSON,

Special Attorney, Lands Division,

Department of Justice.

The Court: This is an attempt to bring this action under the Tort Claims Act. I will say frankly that I am somewhat familiar with the Tort Claims Act. I am in the process of writing a lecture to be given before the Conference of Judges, at Los Angeles, a portion of which lecture I gave before the Long Beach Bar a week ago Friday.

In looking at this complaint, I can't see why counsel thinks an action of this character comes within that.

Mr. Crouch: Because the Fifth Amendment provides that nobody can be deprived of his property without compensation. I am complaining of the act of the government in taking property on which I have liens, and doing so by suit in which they do not make me a party of record.

The Court: The mere fact that you own bonds does not make you a party to the action.

Mr. Crouch: What about a lessee?

The Court: The lessee is not a party. As a matter of fact, the government is not interested. Sometimes the lessee claims greater value to his property than the owner. I know of one case in the Mojave Desert, where the owner claimed a value, and the lessee claimed the value to be 10 times higher than that claimed by the owner.

Mr. Crouch: The statute provides for the filing of a [2\*] declaration of taking, and bringing suit it provides for suing the owners and all persons in interest.

The Court: Having an improvement bond does not make you the owner of the property. It is merely a lien, to which you can resort under certain circumstances. I was judge of the Superior Court for eight years, from 1927 to 1935; I am familiar with the nature of the Voorman Act, and the Mattoon Act. Sometimes one piece of property will have bonds amounting to thousands of dollars, and those bonds are split into small denominations. On my own home, in Hollywood, I have \$1100 in bonds, and there may be 11 owners of bonds. An investment company buys them up, and distributes them, and if I want to ascertain the bondholders, or the County of Los Angeles or the City of Los Angeles or City of San Diego or the County of San Diego, and I can locate the bondholders for every lot.

Mr. Crouch: That is a matter of record.

The Court: I know, but that is not the point.

Mr. Crouch: In the case of *Silberman v. United States*, 131 Fed. (2d) 715, dealing with the question of the lessee, the court said:

Upon condemnation, the condemnor is vested with a complete title, and all interests in the property taken are extinguished.

All persons having any interest in property [3] taken are "necessary parties" to the condemnation proceeding.

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\* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: That is not a Ninth Circuit case. Remember in condemnation we are not governed by the rules, but we are governed by State law and, therefore, each state has a different rule.

Mr. Crouch: This is a federal case.

The Court: I know, but the federal rules as to condemnation do not apply. You must show me that the bondholder is a necessary party. And you have got to show me a Ninth District case.

Mr. Crouch: In 131 Fed. (2d) 715——

The Court: What page are you reading from? Is that where it says “Upon condemnation, the condemnor is vested”——

Mr. Crouch: Yes.

The Court: That is page 717.

Mr. Crouch: “Upon condemnation, the condemnor is vested with a complete title, and all interests in the property taken are extinguished. All persons having any interest in the property taken are necessary parties to the condemnation proceeding. The principle that the owner of an estate or interest in property condemned is entitled to compensation is not open to dispute. Nor is it doubted that a lessee for a term of years has an interest which must be recognized upon the taking of the property covered by his lease.” [4]

The Court: Yes. But the facts in your record show that an action was brought and the amount awarded diminished the value of your bond. I can't see how it is the government's look-out. Your recourse is against the agency from whom you bought the bond.

Mr. Crouch: In *Jacobs v. U. S.*, 190 U. S. 916, it is said:

“The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suit by the owner did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested on the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such promise was implied because of the duty to pay imposed by the Amendment. The suits were founded on the Constitution of the United States.”

In my brief——

The Court: I have read your brief. I will hear from the other side. I heard you first, because I wanted to know what your theory is. [5]

Mr. Crouch: There is one other thing I wish you would permit me to call to your attention here. That is the case of *Holt v. Collins*, 154 Cal. 265, where it was held by the Supreme Court that there is no principle of law which requires such parties, referring to the necessary parties, to intervene, even though they may have actual knowledge.

Here we have knowledge that these bonds are of record, standing in the name of the plaintiff in this case. The government became the owner of the



property by reason of having filed a declaration of taking, depositing the estimated value in the registry of the court, thereby securing immediate possession. What we had was the right to compensation, and the language of Chief Justice Hughes was that in order to constitute due process of law, he himself must be a party to the case, and they have their day in court. We are left in a position where we are totally without relief.

Mr. Yudelson: These people are not necessary parties, and in the case of *Pomona College v. Dunn*, 7 California Appeals (2d) 227, which involved whether the mortgagee was a necessary party to the proceeding, the court held that he was a proper party, but the court specifically held that he was not a necessary party to the proceeding.

As to the basic question, it has nothing to do this morning with whether or not the plaintiff held a right to compensation, because he has not brought a petition to receive the [6] award, or that portion of the award he alleges is due him out of the funds deposited, or sums to be distributed. He claims the distinct right to sue the United States under USCA 1346, Judicial Code, which is now the Tucker Act. He had actual notice. The records and files of 172 SD show, among other proceedings, that Mr. Thibodo was a witness on May 9, 1944, in a consolidated hearing of 230 SD and 172 SD.

With respect to 172 SD, it was being tried as to the parcels involved herein, to determine compensation before a jury. Mr. Thibodo was a witness,

and sat there in the court room for two days. He knew what the property was. He had actual notice. And under the decision of the California Supreme Court in *Harrington v. Superior Court*, 194 Cal. 188, we feel that the plaintiff is estopped from raising this claim at this time.

I should like to call the court's attention to the case of *Phillips v. United States*, 151 Fed. (2d) 645, in which the factual situation is substantially similar to the one involved here. There the plaintiff, who was a tenant under an oral lease, brought an action under the Tucker Act to recover the value of lands taken. The facts were substantially the same as here. The plaintiff, in the *Phillips* case, appeared on behalf of the landowner, and testified as to the value of the land:

The Court: So far as that point is concerned, under the [7] new rules I cannot consider a motion for summary judgment on any evidence outside of the pleadings themselves.

Mr. Yudelson: In the case of *Mullen Benevolent Corporation v. United States*, 390 U. S. 89, an action was brought under the Tucker Act, to recover a balance due on improvement district bonds on land acquired by the United States. The Idaho act provided that the amounts expended should become liens on the land. The trial court found in favor of the plaintiff and was reversed upon appeal. The Supreme Court of the United States said:

"The bondholder is in equity the owner of the assessment fund and, as the real party in interest,

may, in event of the city's default in collection, enforce the city's right to collect the assessment out of the land. The bonds have no general lien upon the land in the district and save through the assessment no special lien on any tract \* \* \*

“By purchase of the lands, the United States at most frustrated action by the city to replenish the investment fund to which alone the bondholder must look for payment of his bond. But this was not a taking of the bondholder's property.”

As stated, purely and simply, it is our position here that we have not taken their bond.

The Court: All right. [8]

Mr. Crouch: In *Stubbs v. United States*, 21 Fed. Supp. 1007, it is stated:

“The pleadings merely refer to the judgment and decree entered in both the state and federal courts but expressly allege plaintiffs were never parties thereto. If these allegations are true, the judgments are void, because it is elementary that a judgment cannot bind a person who is not a party to the suit.”

The Court: That is true, as a matter of pleading, but you are alleging facts in the case, and I can determine whether you are a necessary party or not. It is only a personal judgment which binds only the party. So the question arises whether you are a necessary party to the action and, second, whether you have that right.

Mr. Crouch: I think under the provisions of 40 USCA 257 it contemplates that the owner and all persons having an interest of record——

The Court: The owner of a bond is not a party having an interest directly. That only applies to the mortgagee and the owner.

Mr. Crouch: The rule provides that the bonds shall be issued in the name of a definite person, and those bonds shall be a lien on the property until paid; that title cannot be transferred except subject to the bonds. [9]

I think I understand something of the nature of condemnation proceedings so far as the government is concerned, and that is that the government is interested in the right as an entirety. It fixes the value of a piece of property, and it is not interested in a person having a common rather than an adverse interest. It provides that the declaration of taking shall be in the name of all persons having any interest. Counsel has devoted considerable time talking about things that are not a matter of record.

The Court: There is no affidavit, under the amendment to the rules which went into effect two years ago. You made your motion to dismiss, filed an affidavit, but that has not been done so I am treating this as an old-fashioned demurrer; but I cannot consider anything *de hors* the record. So I will confine you to the record.

Mr. Yudelson: We are not now deciding whether Mr. Thibodo has a right to any part of the award in the condemnation.

The Court: There is no allegation in the complaint that he has been deprived of that.

Mr. Yudelsohn: It isn't quite clear to me what he is proceeding under.

The Court: It is for the total amount of the bond plus 7 per cent interest.

Mr. Yudelsohn: That is correct. I call the court's attention [10] to the paragraph 2 which speaks about the Fifth Amendment.

The Court: He has a regular action and also asks for a declaratory judgment. He is not entitled to a declaration of right.

Mr. Crouch: I wish to cite as an authority 28 Judicial Code, Section 1346, subdivision 2, which provides that a suit in the District Court is upon any express or implied contract within the United States, and under the decision in *Jacobs v. United States*, when property has been taken from a man without making him a party, it constitutes a suit under an implied contract.

The Court: The motion to dismiss will be granted. [11]

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of August A.D., 1949.

/s/ HENRY A. DEWING,  
Official Reporter.

[Endorsed]: Filed Sept. 7, 1949.

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[Endorsed]: No. 12371. United States Court of Appeals for the Ninth Circuit. F. E. Thibodo, Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed September 30, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals,  
for the Ninth Circuit

Case No. 12371

F. E. THIBODO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS RELIED UPON APPEAL AND  
DESIGNATION OF THE NECESSARY  
RECORD

To the Above Entitled Court and the Clerk Thereof:

As a statement of the Points which the Appellant intends to rely upon on this appeal, the Appellant here adopts the Statement of such points as filed in the United States District Court, Southern District of California, being a part of the record herein.

For a designation of the parts of the Record to be printed, and necessary for a consideration of this appeal, the Appellant designates the entire record.

Dated October 5, 1949.

/s/ GEORGE W. CROUCH,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 6, 1949.





No. 12371

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In the United States Court of Appeals  
for the Ninth Circuit

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F. E. THIBODO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES

---

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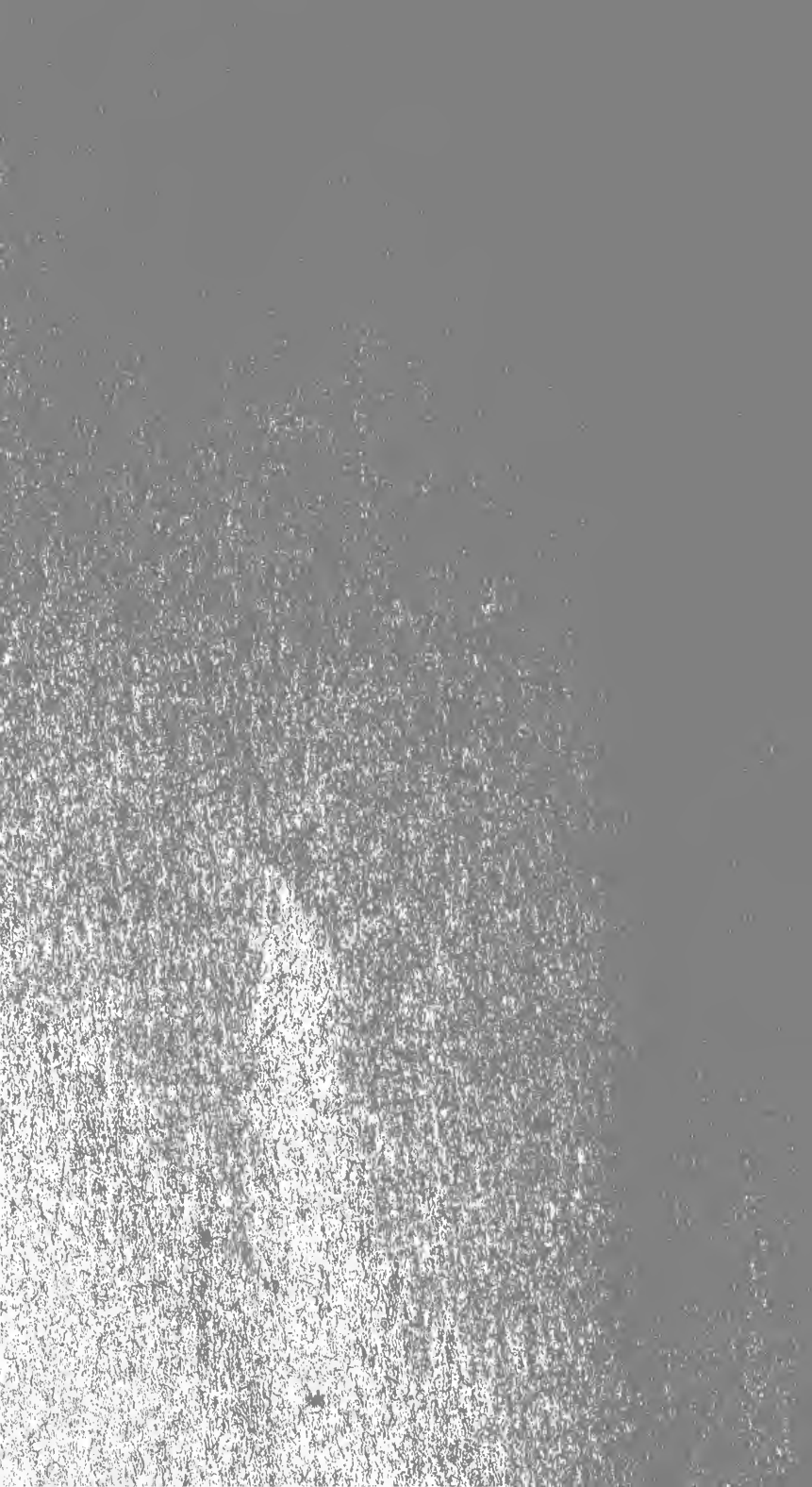
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FILED

DEC 27 1949

PAUL P. O'BRIEN,

CLERK



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**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 12371

F. E. THIBODO, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

---

**BRIEF FOR THE UNITED STATES**

---

**OPINION BELOW**

The district court did not write an opinion. Its reasons for its action are set forth in its judgment (R. 21-22).

**JURISDICTION**

This is an appeal from a judgment dismissing a complaint without leave to plead further. The judgment was entered June 20, 1949 (R. 20-22). Notice of appeal was filed July 27, 1949 (R. 23). The jurisdiction of the district court was invoked under 28 U. S. C. section 1346 (a) (2) (R. 2-3). The jurisdiction of this Court rests upon 28 U. S. C. section 1291.

**QUESTIONS PRESENTED**

1. Whether the fact that plaintiff was not made a party to a proceeding to condemn land which was sub-

ject to a lien to secure payment of street improvement bonds owned by him gives him the right to bring suit against the United States to recover the amount of the bonds, when (a) the United States did not have notice of his claim, (b) the city, which was under a duty to collect assessments to pay the bonds and to take numerous other steps to protect the bondholder and secure ultimate payment of the bonds, was made a party to the proceeding and (c) plaintiff does not contend that he did not have actual knowledge of the condemnation proceeding.

2. Whether plaintiff can assert ignorance of the condemnation proceeding while at the same time relying upon its pendency to excuse his failure to assert his lien within the time prescribed by the state statute.

#### STATUTES INVOLVED

The pertinent provisions of the Street Improvement Act of April 7, 1911, Cal. Stats. 1911, c. 397, p. 730, as amended, General Laws of California (Deering 1931), Act 8199, secs. 20, 20i, 22, 23, 37, 59, 60, 62, 63, 66, 67, 76, 76a; the California Code of Civil Procedure, sec. 330, and the California Civil Code, sec. 2911, are set out in the Appendix, *infra*, pp. 18-27.

#### STATEMENT

This is a suit instituted on November 23, 1948, against the United States to recover the principal sum, together with interest thereon, of improvement bonds issued by the City of National City, California, which it was alleged constituted first liens on certain lands which had been condemned by the United States and for which the plaintiff, owner of the bonds, was not compensated in the condemnation proceeding (R. 2-11). Upon a motion by the United States the complaint was dismissed (R. 11-12, 20-22). The facts as alleged in the complaint are as follows:

On August 24, 1931, the Treasurer of the City of National City issued street improvement bonds under the provisions of the Street Improvement Act of April 7, 1911, as amended (Cal. Gen. Laws (Deering 1931) Act 8199, p. 4519, *et seq.*, especially secs. 20, 59) to represent assessments made to pay the cost of constructing a sanitary sewer and levied against lands fronting on the improvement (R. 3-6). The principal of the bonds was payable in ten annual instalments, the first being due on January 2, 1932, and the last on January 2, 1941 (R. 5-6; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 60, 63). The bonds bore interest at the rate of 7% payable semi-annually and upon default of any payment of principal or interest were subject to an immediate penalty of 5% of the amount thereof, together with an additional penalty of 1% of the defaulted amount each month following the default (R. 5-8; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 60, 63). Under the statute the assessment constitutes a first lien on the lots until the bond issued for the payment thereof, together with accrued interest and penalties, if any, are paid (R. 3, 6; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 23, 63, 66). Nothing has ever been paid on the bonds, either of principal or interest (R. 6).

The complaint further alleged that on or about February 9, 1943, the United States instituted proceedings to condemn the lands which had been assessed to pay bonds owned by the plaintiff in the present case; that on or about the same date the United States filed a declaration of taking, thereby vesting title to the lands sought in the United States under the provisions of the Declaration of Taking Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a; that an order of possession was made in pursuance thereof and thereupon the United States entered into possession of the property; that plaintiff here was not made a party to

the condemnation proceeding nor served with summons; and that final judgment has been entered and the awards disbursed without any compensation to plaintiff for his bonds (R. 3-4, 9).

The complaint here seeks judgment against the United States for a sum of money amounting to the total of the principal sums of plaintiff's bonds with interest thereon at the rate of 7% from August 24, 1931, to February 9, 1943 (which is alleged to be less than the value of the property, R. 8-9), a decree that each bond constitutes a separate lien on the property described until paid, a declaration of the rights of the parties, costs and such general, other and further relief as may follow in the due course of law (R. 10). The United States moved to dismiss the complaint on various grounds and, in the alternative, moved to strike the complaint and for a more definite statement in certain particulars (R. 12-17). After hearing argument of counsel (R. 33-41), the district court determined (1) that plaintiff as a bondholder was a proper but not a necessary party to the condemnation proceeding, (2) that a bond register maintained in the office of the county treasurer as required by the California Streets and Highway Code, sec. 6400, *et seq.* (see Cal. Gen. Laws (Deering 1931) sec. 66) did not constitute either actual or constructive notice to the United States of plaintiff's claims and (3) that the complaint does not state sufficient facts to constitute a cause of action against the United States (R. 21-22). Accordingly, an order was entered dismissing the complaint without leave to plead further (R. 22). This appeal followed (R. 23).

#### ARGUMENT

It is not clear either from the complaint or from plaintiff's brief upon what theory he seeks to recover in this suit against the United States. However, by process of elimination it appears that there is only one ground upon which it could possibly rest. The United States is,



of course, under no obligation to pay the bonds.<sup>1</sup> And, although the complaint asked for a decree that the bonds are a lien on the property, it is clear that any attempt to secure such an adjudication or to obtain foreclosure of the lien would constitute an attempt to sue the United States without its consent. *United States v. Alabama*, 313 U. S. 274, 282-283 (1941).<sup>2</sup> The jurisdiction of the court below was sought to be invoked under 28 U.S.C. sec. 1346(a) (2), formerly the Tucker Act (R. 2-3). Such jurisdiction could be supported only upon a theory that plaintiff is seeking just compensation for the taking of his interest in the property. Although the complaint is indefinite and ambiguous, the references to the condemnation proceedings indicate that the theory is that as a result of institution of condemnation proceedings, the filing of a declaration of taking and the entry of the United States into possession there was a taking of the property but that plaintiff was not bound by the judgment fixing the amount of compensation and ordering it distributed among the persons entitled thereto because he was not made a party thereto nor was he served with summons therein. Assuming this to be plaintiff's theory, we submit that the court below correctly dismissed plaintiff's complaint.

## I

### **The Fact That Plaintiff Was Not Made a Party to the Condemnation Proceeding Does Not Give Him the Right to Maintain This Suit**

The California Code of Civil Procedure, sec. 1244, provides that the complaint in condemnation shall contain “\* \* \* the names of all owners and claimants, of

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<sup>1</sup> The Street Improvement Act of 1911, as amended, Cal. Gen. Laws (Deering 1931), Act 8199, contains no provision for personal liability on the part of owners of lands assessed to pay improvement costs.

<sup>2</sup> Moreover, if this be a suit to enforce the lien, it is barred by the California statutes. Cal. Civ. Code, sec. 2911; Cal. Code Civ. Proc. sec. 330.

the property, if known, or a statement that they are unknown, who must be styled defendants.”<sup>3</sup> The trial court held that plaintiff, while a proper party, was not a necessary party to the condemnation proceeding (R. 21). In his brief on appeal, plaintiff cites no cases tending to show that he was a necessary party to that proceeding, but refers (Br. 11-13) to the provisions of the California Street and Highways Code making the recording of street assessments in the office of the Superintendent of Streets notice to all persons of the contents thereof and, apparently on the assumption that this makes him a holder of an “interest of record” (see Br. 13), relies upon cases stating that persons having certain interests in land condemned are necessary parties to the proceeding and cases stating that when property is taken for public use without compensation suit may be brought against the United States to recover its value (Br. 13-15).<sup>4</sup>

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<sup>3</sup> The pleadings and practice in federal condemnation proceedings follow local law. Act of August 1, 1888, sec 2, 25 Stat. 357, 40 U.S.C. sec. 258.

<sup>4</sup> None of the cases cited (Br. 13-15) presented a recovery by a plaintiff in a situation analogous to that here involved. *Jacobs v. United States*, 290 U.S. 13 (1933); *Sponenbarger v. United States*, 101 F. 2d 506 (C.C.A. 8, 1939), reversed 308 U.S. 256; *Tilden v. United States*, 10 F. Supp. 377 (W.D. La. 1934); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); and *Phelps v. United States*, 274 U.S. 341, 343 (1927), all presented cases where no condemnation proceedings were instituted and owners or lessees recovered for takings under the Tucker Act. In *Silberman v. United States*, 131 F. 2d 715 (C.C.A. 1, 1942) the lessee was a party to the condemnation proceedings and the issue related to his right to present evidence of value. In *Stubbs v. United States*, 21 F. Supp. 1007 (M.D. N.C., 1938), although the court held that a life tenant and remaindermen who were not parties to a condemnation proceeding could sue under the Tucker Act, recovery was denied because not brought within the statutory time. This case has no tendency to support plaintiff's claim that a holder of an assessment bond under California law is a necessary party. In *United States v. Parcel of Land, Etc.*, 54 F. Supp. 901 (E.D. Va., 1944), the trustee in a deed of trust and holder of a debt was allowed to intervene without opposition in a condemnation proceeding with the statement (p. 904) that “it would seem” that they are entitled to be parties to the cause on the record.

To determine whether the failure of the United States to make plaintiff a party to or to serve him with notice of the condemnation proceeding entitles him to bring suit against the United States for a taking of his property without just compensation, it is necessary to examine the state statutes regarding street improvements and the bonds issued to represent assessments to pay the costs of such improvements.

*A. Section 23 of the Street Improvement Act of 1911 does not make plaintiff an owner of record.*—The Street Improvement Act of 1911, as amended, under which plaintiff's bonds were issued, provides that the expenses incurred for work authorized by the act "shall be assessed upon the lots and lands fronting thereon \* \* \*; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work." Cal. Gen. Laws (Deering 1931), Act 8199, sec. 20.<sup>5</sup> Section 23 provides that the assessment (together with a warrant authorizing the contractor making the improvements to demand and receive the assessments and a diagram of the property affected by the improvement, showing each lot and parcel therein (see secs. 20i, 22)) shall be recorded in the office of the superintendent of streets, and

\* \* \* When so recorded, the several amounts assessed shall be a lien upon the lands, lots or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record. \* \* \* and from and after the date of said recording of any warrant, assessment and diagram, all persons shall be deemed to have notice of the contents thereof.

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<sup>5</sup> Inasmuch as plaintiff's bonds were issued in August 1931, reference will be made to the 1931 edition of the General Laws insofar as the provisions of that date are applicable. The Street Improvement Act of 1911 has subsequently been amended and now appears in the Street and Highway Code.

Section 37 provides as follows:

The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge.

It is on the two latter sections that plaintiff relies (Br. 12) for notice to the United States of its bonds. However, these sections relate only to the record of the assessment. When bonds are issued to represent the assessments, a register of the bonds, showing the series, number, date, amount, rate of interest, payee and indorsees of each bond, is kept in the office of the city treasurer. There is no statute making this register constructive notice of its contents and, as the trial court held (R. 21-22) the register "is not such a public record as constitutes either actual or constructive notice to the United States of America of the existence of the claims of this complainant arising out of the ownership of Public Improvement Street Lien Bonds." Consequently, as will appear from further examination of the provisions of the Street Improvement Act of 1911 relating to the bonds, the United States discharged any obligation arising out of the statutory notice of the assessments by making the city a party to the condemnation proceeding (R. 8).

*B. It was sufficient that the city was made a party to the condemnation proceeding.*—The Street Improvement Act imposes on the city the duty of collecting the assessments to pay the bonds, placing them in a separate fund in the city treasury and paying them out on de-

mand of the bondholder. See *Bryant v. Commissioner of Internal Revenue*, 111 F. 2d 9, 15, 17, 19 (C.C.A. 9, 1940). The city treasurer is required to send notices of the amount due to the owners of property assessed 15 days before each interest or principal payment is due (Cal. Gen. Laws (Deering 1931) Act 8199, sec. 62), to put all assessments collected in a special fund to be kept by him (Id. sec. 60), to add and collect penalties for delinquent payments (Id. sec. 62), to pay out assessments collected to the bondholder upon demand (Id. sec. 60) and to advertise and sell the property assessed for delinquent payments upon demand by the bondholder (Id. secs. 67-75). He is also required to certify delinquent payments to the city or county tax collector (whichever collects the taxes of the particular municipality) and the latter are required to attach notice of the delinquency to the municipal tax bill (Id. sec. 76). With one exception,<sup>6</sup> all rights and benefits that the bondholders possess are acted upon for them by the city. The only acts required of the bondholder to collect his money are to request payment from the city treasurer after the instalment due date and to request the treasurer to sell the property when there is a default in payment. In fact, as this Court pointed out in *Bryant v. Commissioner of Internal Revenue*, 111 F. 2d 9, 15, 17 (1940), the all important factor in making improvement bonds valuable is the city's obligation to collect the assessments, place it in a special fund and pay it on demand to the bondholder. If the treasurer fails to carry out his duties to the bondholder the latter may compel him to do so by mandamus. *Oakland S. I. Bond Co. v. Fitzmaurice*, 47 Cal. App. 258, 190 Pac. 499 (1920) ; Cf. *Fox v. City of Pasadena*, 78 F. 2d 948, 950 (C.C.A. 9,

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<sup>6</sup> In addition to the right to have the city treasurer sell the property to satisfy the lien, the bondholder has the right by way of a separate, distinct and cumulative remedy to foreclose the bond lien. Cal. Gen. Laws (Deering 1931) Act 8199, sec. 76a.

1935). As was said in the *Fitzmaurice* case, "A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of the contract. In effect, the bond creates a power of sale, whereby its holder may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond was issued." And, when the treasurer misappropriates the assessment money collected, the city, as trustee for the bondholder, may sue the surety on the treasurer's official bond to recover the sum misappropriated. *Municipal Bond Co. v. Riverside*, 4 Cal. App. 2d 442, 41 P. 2d 215 (1935). If the city is trustee in relation to the bondholder, it was sufficient that the city was a party to the proceedings and it was not necessary to serve notice on the bondholders. Cf. *White River Bridge Corporation v. State*, 192 Ark. 485, 92 S.W. 2d 856, 858 (1936).

C. Moreover, one having actual knowledge of the pendency of a condemnation proceeding is estopped to bring a suit to recover compensation for the taking of his property in the condemnation proceeding on the ground that he was not served with a notice thereof.—Plaintiff did not allege in his complaint, nor does he contend here, that he did not know of the condemnation proceeding in time to have asserted his claim in that proceeding. He contends only that "the right to intervene is not absolute" and "even though an owner of an interest has knowledge of pending litigation, he is under no obligation to intervene" (Br. 19). Whatever may be the rule as to intervention in other types of cases (see Br. 19), one who knows that a proceeding is pending to condemn property in which he has an interest cannot stand by and wait until the case has

proceeded to judgment and the compensation awarded has been paid out to other persons and then bring suit to require the condemnor to pay for his interest in addition to the value of the property already paid.

That this is true is evident from a consideration of the nature of condemnation proceedings and the nature of the rights of claimants such as the plaintiff. A condemnation proceeding is a proceeding *in rem*. It is a taking, not of the rights of designated persons in the property, but of the property itself. All previously existing estates or interests in the land are extinguished. "Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. \* \* \* such an exercise of eminent domain founds a new title and extinguishes all previous rights." *Duckett & Co. v. United States*, 266 U. S. 149, 151 (1924); *Treasure Co. v. United States*, 169 F. 2d 437, 439-440 (C.A. 9, 1948), certiorari denied 335 U. S. 891; see *Weeks v. Grace*, 194 Mass. 296, 299-300, 80 N. E. 220 (1907). Since condemnation proceedings are actions *in rem*, the jurisdiction of the court rests, not upon notice to individual owners, but upon the power of the court over the *res*. See *Pennoyer v. Neff*, 95 U. S. 714, 727 (1877). Jurisdiction over the *res* is conferred upon the district court where the property is located by the Act of August 1, 1888, sec. 1, 25 Stat. 357, 40 U. S. C. sec. 257.<sup>7</sup> Thus, the district

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<sup>7</sup> It may be noted that it is apparent from the provisions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a, that the jurisdiction of the court over the property is not dependent upon notice to individual owners. A declaration of taking may be filed in any condemnation proceeding instituted by the United States "*with the petition* or at any time before judgment." (Italics supplied). It is also provided that "upon the filing of a declaration of taking" the court shall have the power to fix the time and terms on which possession shall be surrendered. Thus, neither the vesting of title nor the power of

court had jurisdiction of the condemnation proceeding and the final judgment entered therein confirming the title which had vested in the United States by the filing of a declaration is valid.<sup>8</sup>

However, the Fifth Amendment provides that private property shall not be taken for public use without just compensation. "The principle that the owner of an estate or interest in property condemned is entitled to compensation is not open to dispute. \* \* \* The right to compensation carries with it the right to be heard upon the important question of the value of the property taken and the damages caused." *Silberman v. United States*, 131 F. 2d 715, 717 (C.C.A. 1, 1942). "With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 284-285 (1925). However, an owner of an interest less than the fee does not have an absolute right to present evidence of fee value when that is the estate taken. His only interest is that there will be sufficient funds to compensate him for the value of his interest. *Silberman v. United States*, 131 F. 2d 715, 717-718 (C.C.A. 1, 1942).

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the court to enter orders of possession depends upon notice. Cf. *City of Oakland v. United States*, 124 F. 2d 959 (C.C.A. 9, 1942), certiorari denied 316 U.S. 679. Moreover, *ex parte* orders of possession may be found in cases where the declaration of taking is not used. See, e.g., *Brett v. United States*, 86 F. 2d 305, 306 (C.C.A. 9, 1936), certiorari denied 301 U.S. 682; *Palisade v. Irrigation Dist.*, 85 Colo. 57, 60, 273 Pac. 646 (1928); cf. *Schrader v. Third Judicial District Court*, 58 Nev. 188, 199-200, 73 P. 2d 493 (1937) ("the requirement in our statute for the giving of notice before property sought to be condemned can be occupied, is a precautionary step, which the statute need not require in condemnation proceedings.")

<sup>8</sup> In fact, as pointed out, *supra*, pp. 4-5, it can only be on the theory that plaintiff's lien was extinguished and his interest in the property thereby taken without compensation to him that he can assert the right to maintain the present suit.



Consequently, if the condemnation award exceeds the value of such an interest, the owner thereof may not complain if he is given notice of the proceedings in time to assert his claim against the award. This is particularly true in the case of lien claimants who have no actual estate or interest in the property, but only a right to proceed against it to satisfy their claims. As was held in *St. Paul v. Certain Lands in St. Paul*, 48 F. 2d 805, 807 (C.C.A. 8, 1931), a tax lienor has no such interest in the property as would permit it to appeal from a condemnation award which exceeded the amount of its tax claim. And, even though a mortgage or tax lienor is not made a party to a condemnation proceeding prior to judgment, the condemnor is entitled to be protected by having the liens paid out of the fund deposited in court. *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853 (1909). It is apparent, therefore, that a lien claimant is not a "necessary party" to a condemnation proceeding and that he is amply protected if he is given an opportunity to assert his claim at some stage of the proceeding.

The California Code of Civil Procedure, sec. 1246, specifically authorizes anyone claiming an interest in the property described in the complaint to intervene. Consequently, one who knows there is a proceeding pending to condemn land in which he has some claim has the opportunity to assert his claim in the proceeding. Plaintiff suggests no reason why he should be permitted to wait until judgment has been entered and the award disbursed to other persons and then bring a suit for compensation for his interest on the theory that it was taken in the condemnation proceeding without service of notice on him. Therefore, if plaintiff here had actual knowledge of the condemnation proceeding he is estopped now to rely upon the fact that

he was not served with notice as giving him a right to bring this suit against the United States. As was said in *State v. Superior Court*, 80 Wash. 417, 424-425, 141 Pac. 906 (1914):

It is asserted, and is not denied, that the relator lessees were present in the court-room and had knowledge and notice of the proceeding. They knew the statute law of the state. The object of the law is to give notice to those having a disclosed interest. It does not deny the right of those having an undisclosed interest to be heard at any stage of the proceeding. The object of notice is notice, and the relator lessees could have had no more notice and it would have been no more incumbent upon them to assert their interest in the original proceeding or under the statutory provision for apportionment of the award had they been made parties to the action and been served with a formal written notice of the hearing.

See also *Joo v. United States*, 60 C. Cls. 850, 855-856 (1925); *Peach Bottom Railway Co. v. McAlister*, 7 Pa. Super. Ct. 574 (1898).<sup>9</sup>

## II

### **Plaintiff Cannot Assert Ignorance of the Condemnation Proceeding While at the Same Time Relying Upon Its Pendency to Excuse His Failure to Assert His Lien Within the Time Prescribed by State Law**

The time within which the bondholder might himself bring judicial proceedings to foreclose the lien was limited to four years after the due date of the last installment on the bond or the last principal coupon attached thereto. Cal. Gen. Stats. (Deering 1931) Act 8199, sec.

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<sup>9</sup> One ground of the Government's motion to dismiss the complaint was that plaintiff had actual notice of the condemnation proceeding (R. 12). If it is concluded that the plaintiff is not required to allege lack of knowledge in his complaint, the factual question whether he did have such knowledge will then have to be determined at a trial on the merits. Cf. R. 37-38.

76a. That time would have expired as to plaintiff's bonds on January 2, 1945. In 1931 when plaintiff's bonds were issued there was no statutory limitation on the time within which the bondholder might request the city treasurer to enforce the assessment lien by selling the property assessed. In 1945 the state legislature amended the California Civil Code (sec. 2911) and added a section to the California Code of Civil Procedure (sec. 330) by providing that the treasurer or other public official having power to sell property to satisfy the lien on request of the bondholder may do so within four years after the due date of the last installment or last principal coupon or prior to January 1, 1947, whichever is later, but not thereafter and that the lien is extinguished by expiration of such time (see Appendix, *infra*, pp. 26-27). These 1945 amendments are applicable to bonds issued prior thereto. *Rombotis v. Fink*, 89 C.A. 2d 378, 201 P. 2d 588 (1948). Since the four-year period prescribed by the amendments expired as to plaintiff's bonds on January 2, 1945, he had until January 1, 1947, the later of the two dates, to request the city treasurer to enforce his lien. Thereafter all remedies for enforcement of plaintiff's lien were barred and by express provision of the statute his lien was extinguished.

Plaintiff contends, however, that since title to the property had vested in the United States on February 9, 1943, when a declaration of taking was filed, he could not enforce the lien thereafter (Br. 16-18). But plaintiff occupies inconsistent positions. He cannot contend, as he does (Br. 18), that because of the condemnation proceedings he was confronted with a situation where he could not foreclose his bonds and at the same time excuse his failure to present his claim in the condemnation proceedings. He should not be permitted to rely upon the condemnation proceeding as an excuse for sleeping on

his rights and at the same time deny knowledge of the proceeding. The least that should be required of him is that he assert the claim in the condemnation proceeding before the expiration of the time allowed for enforcing the lien under the statute. And if he had done so he would have been protected from the running of the statute. See *Ross v. Gates*, 183 Mo. 338, 81 S.W. 1107 (1904). Plaintiff contends, however, that the six-year period of limitations prescribed by the federal statute (28 U.S.C. sec. 2401) for the bringing of suits against the United States is controlling over the state statute and that the taking of his interest occurred on February 9, 1943, less than six years before this suit was brought.<sup>10</sup> This argument overlooks the fact that whatever plaintiff's rights in the property may have been, the only basis for any right to bring the present suit against the United States lies in the fact that he was not served with notice of the condemnation proceeding. Otherwise, he would be precluded by the judgment in that case. As we have said above, he may not rely upon the condemnation proceeding to preserve his lien despite the state law and at the same time rely upon the fact that he was not given notice of the proceeding to give him a right of suit against the United States.

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<sup>10</sup> One ground of the motion to dismiss was that this action was barred by the Federal Statute of Limitation (R. 12). The allegations of the complaint are that the condemnation proceedings were instituted and declaration of taking filed "on or about" February 9, 1943, and that "thereupon" the United States entered into possession (R. 9). Apparently anticipating a contention that there had been an earlier taking by entry into possession, plaintiff asserts (Br. 16-17) that because of the Government's right to abandon there was no taking until the declaration of taking was filed. Since the complaint does not allege any governmental acts prior to February 9, 1943, and the dismissal of the complaint was not based on such grounds, it would be premature at this time to discuss the question whether because of earlier acts the limitation period commenced prior to February 9, 1943, and, of course, that question will never be reached if, as we believe, the dismissal of the complaint was correct.

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully,

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DECEMBER 1949.

## APPENDIX

The pertinent provisions of the Street Improvement Act of April 7, 1911, Cal. Stats. 1911, c. 397, p. 730, *et seq.*, as amended Cal. Gen. Laws (Deering, 1931) Act 8199, are as follows:

§ 20. Assessment for street improvement. The expenses incurred for any work authorized by this act \* \* \* shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work. [Amendment approved June 14, 1929; Stats. 1929, p. 1656.] Cf. Cal. Sts. & H. C. sec. 5315.<sup>11</sup>

§ 20i. Diagram of property affected. Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city engineer shall prior to completion of the contract make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show \* \* \*. [New section added June 14, 1929; Stats. 1929, p. 1660.] Cf. Cal. Sts. & H. C. secs. 5341-5343.

§ 22. Warrant. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

#### Form of Warrant

By virtue hereof, I (name of the superintendent of streets), of the city of —, county of — (or city and county of —), and state of California, by virtue of the authority vested in me

<sup>11</sup> For the convenience of the court, reference will be made to the corresponding provisions in the present law which are found in the California Streets and Highways Code. However, no attempt will be made to indicate how, if at all, the sections may have been changed.

as said superintendent of streets, do authorize and empower (name of contractor) (his or their) agents or assigns, to demand and receive, the several assessments upon the assessment and diagram hereto attached and this shall be (his or their) warrant for the same. \* \* \* [Cf. Cal. Sts. & H. C. sec. 5371.]

§ 23. Recording and delivery of warrants, etc. Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record. Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property; and from and after the date of said recording of any warrant, assessment and diagram, all persons shall be deemed to have notice of the contents thereof. After said warrant, assessment and diagram are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agents or assigns, shall be authorized to receive the amount of the several assessments made to cover the sum due for the work specified in such contract and assessments. [Amendment approved May 24, 1927; Stats. 1927, p. 1407.] Cf. Cal. Sts. & H. C. sec. 5372-5374.

§ 37. Records of street superintendent. The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified,

may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge. [Cf. Cal. Sts. & H. C. sec. 5680.]

§ 59. Serial bonds may be issued. The city council of any municipality in this state shall have the power, in its discretion, to determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in Part I of this act. [Cf. Sts. & H. C. sec. 6400.]

§ 60. Life of bonds. Said serial bonds shall extend over a period not to exceed fourteen years from the second day of January next succeeding fifteenth day of the next November following their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon on the second day of January every year after the fifteenth day of the next November following their date, until the whole is paid; \* \* \* and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year after their date, at the rate of not to exceed ten per cent per annum on all sums unpaid, until the whole of said principal and interest are paid. Upon such bonds dated after the fourteenth day of May of any year and on or before the fourteenth day of the following November the first interest coupon on said bonds shall become due and payable on the second day of the next succeeding January \* \* \* .

*Bonds: where paid.* Said bonds and interest thereon shall be paid at the office of the city treasurer of said municipality, who shall keep a fund designated by the name of said bonds, into which he shall place all sums paid him for the principal of said bonds and the interest thereon, together with all penalties thereon, and from which he shall disburse such sums, upon the presentation of said coupons; and under no circumstances shall said



bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee and indorsees of each bond, and the number and amount of each coupon of principal or interest paid by him and shall cancel and file each coupon so paid. [Amendment approved June 12, 1931; Stats. 1931, p. 1576.] Cf. Sts. & H. C. secs. 6424-6425; 6462-6463.

§ 62. Unpaid assessments and interest. \* \* \* Should any payment of principal of said unpaid assessments or of interest thereon be not paid on the date upon which the coupon or coupons representing it are payable, the city treasurer shall after the close of business on said due date add to the amount of principal or interest so delinquent a penalty of five per cent of the total amount of such delinquency, and at the beginning of the business on the first day of each succeeding month until such delinquent payment and all penalties thereon be fully paid, he shall add an additional penalty of one per cent of the amount of such delinquency, and said treasurer shall collect such penalties with and as a part of such delinquent payments.

*Notice to owners.* The city treasurer shall at least fifteen days before each respective fifteenth day of May and November, until said assessment be paid in full, mail, postage prepaid, to each owner of property described in said assessment, at his last known address, as appears upon the tax rolls of said city, a postal card notifying him of the amount due and the date when payment is due from him on said assessment and stating that said payment is subject to penalty if not paid on or prior to the due date of the coupons. Provided, that the failure of the city treasurer to mail said cards or the failure of the property owner to receive the same shall in nowise affect the validity of any penalty or invalidate any act or proceeding. [Amendment approved May 24, 1927; Stats. 1927, p. 1410.] Cf. Sts. & H. C. secs. 6442-6443.

§ 63. Street improvement bonds. Form of bond. The city treasurer shall upon the filing of said list, make out, sign, and issue to the contractor, or his assigns, payee of the warrant and assessment, a separate bond, representing upon each lot or parcel of land upon said list the total amount of the assessment against the same, as thereon shown, where the unpaid assessment or the unpaid remainder thereof amounts to twenty-five dollars or over. \* \* \*

*Form of bond.*

Said bond shall be substantially in the following form:

STREET IMPROVEMENT BOND

Series (designating it), in the city (or other form of the municipality) of (naming it).

\$—100

No. —

Under and by virtue of an act of the legislature of the state of California (title of this act), I, out of the fund for the above designated street improvement bonds, series — will pay to —, or order, the sum of — dollars, (\$—) with interest at the rate of — per cent per annum, all as is hereinafter specified, and at the office of the — treasurer of the —, of —, state of California.

This bond is issued to represent the cost of certain street work upon —, in the — of —, as the same is more fully described in assessment number — issued by the street superintendent of said —, after the acceptance of said work, and recorded in his office. Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and in the diagram attached thereto, as number —, and which now remains unpaid, but until paid, with accrued interest, is a lien upon the property affected thereby, as the same is described herein and in said recorded assessment with its diagram, to wit: the lot or parcel

land in said — of —, county of —, state of California, —.

This bond is payable exclusively from said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise of its principal or interest. The term of this bond is — years from the second day of January next succeeding the fifteenth day of the next November following its date, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the second day of January of each year, following the fifteenth day of the next November, after its date, an even annual proportion of its whole amount is due and payable, upon presentation of the coupon therefor, until the whole is paid, with all accrued interest at the rate of — per centum per annum.

The interest is payable semi-annually, to wit: on the second days of January and of July in each year hereafter, upon presentation of the coupons therefor, hereto attached, the first of which is for the interest from date to the next second day of —, and thereafter the interest coupons are for semi-annual interest.

*Redemption of bond.* This bond may be redeemed by the owner or any person interested in any lot or parcel of land described herein, in the manner provided in said act, at any time before maturity, and before commencement of proceedings for sale, upon payment to the city treasurer, for the holder of this bond, of the amount then unpaid on the principal sum thereof, with interest thereon calculated up to the due date of the next maturing interest coupon, and all penalties accrued and unpaid, together with interest for six months at the rate named in said bond.

*Default in payment of principal or interest.* Should default be made in the annual payment upon the principal, or in any payment of interest from the owner of said lot or parcel of land, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and pay-

able, and to have said lot or parcel of land advertised and sold forthwith, in the manner provided by law. In case of such default, there shall be immediately added to such defaulted amount, five per cent of the amount thereof, and on the first day of each month following such default there shall be added a further penalty of one per cent of such defaulted amount. The city shall be entitled to one-half the penalty first imposed, namely, two and one-half per cent and the other two and one-half per cent and all subsequent penalties shall be paid to the holder of the bond along with and as a part of such defaulted payment.

At said — of —, this — day of —, in the year one thousand — hundred and —.

City treasurer of the — of —.

[Amendment approved May 9, 1923; Stats. 1923, p. 278.] Cf. Sts. & H. C. sec. 6460.

§ 66. To whom payable. Coupons. Record of bonds. The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work. They shall have annual coupons attached thereto, payable in annual order, on the second day of January of every year after the fifteenth day of the next November following the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, as set forth in section sixty hereof. The city treasurer shall, in addition to his other duties in the premises, keep a record of all bonds issued by him, of all payments on said bonds with the dates thereof and of all penalties accruing thereon; and he shall report all payments of coupons or penalties upon said bonds, with the dates thereof, to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to

the credit of which the same are paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon and the penalties, if any, shall be fully paid according to the terms thereof. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under this act. [Amendment approved May 9, 1923; Stats. 1923, p. 280.] Cf. Sts. & H. C. secs. 6427, 6445, 6446, 6461.

§ 67. Penalty for nonpayment. Whenever payment either upon the principal, or of the interest upon any bond issued hereunder has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond demands in writing that the city treasurer proceed to advertise and sell the lot or parcel of land described by said bond as being that upon which the assessment represented by said bond was levied, then said treasurer shall proceed as provided in the next section. [Amendment approved May 23, 1921; Stats. 1921, p. 293.] Cf. Sts. & H. C. sec. 6500.

§ 76. City treasurer to list properties on which taxes are unpaid. Tax collector's notice. Form of notice. It shall be the duty of the city treasurer one (1) month prior to the date it is provided by ordinance or charter of the municipality that taxes are due, or in case taxes are collected by the county for the city on or before the fourth Monday in September of each year, to certify to the city tax collector or in case the city taxes are collected by the county, to the county tax collector, a list of the properties within said city, upon which any payment either of principal or of interest has not been paid when due upon any bond issued under part three of this act. The tax collector shall cause to be pasted or attached to or stamped or printed upon the tax bill or tax receipt a notice which shall in substance be as follows: \* \* \* . [Amendment approved June 6, 1929; Stats. 1929, p. 1306.] Cf. Sts. & H. C. secs. 6590-6593.

§ 76a. Foreclosure of bonds. Form of demand for payment. In the event of the nonpayment of any installment of the interest or principal and by way of a separate, distinct and cumulative remedy, the holder of any bond upon which any payment either upon the principal or of the interest has become delinquent may, at any time after three months after the date it is provided by ordinance or charter of said city that taxes are due, or in case taxes are collected by the county for the city at any time after four (4) months next succeeding the fourth Monday of September, following the date of delinquency of principal or interest and prior to the expiration of four (4) years after the due date of the last installment upon any bond or of the last principal coupon attached thereto, file and maintain a suit to foreclose the lien of the bond and recover the amount due thereon; provided, however, that suit may be brought at any time following the expiration of thirty (30) days after the service of personal demand for payment as herein provided upon the owner of the premises. [New section added June 6, 1929; Stats. 1929, p. 1306.] Cf. Cal. Sts. & H. C. sec. 6610.

Section 330 of the California Code of Civil Procedure provides as follows:

[Time for sale under public improvement assessment lien.] In all cases in which there is now vested or there shall hereafter be vested in a treasurer, street superintendent, or other public official the power to sell at public auction, after demand upon him by the holder of any public improvement bond, any lot or parcel of land upon which exists or which shall hereafter exist a lien to secure the payment of a public improvement assessment represented by said bond, and the act or law establishing such power fails to prescribe the time within which such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to

January 1, 1947, whichever is later, but not thereafter. This section is not intended to extend, enlarge or revive any power of sale which has heretofore been lost by reason of lapse of time or otherwise. [Added by Stats. 1945, ch. 360, § 1.]

Section 2911 of the California Civil Code provides as follows:

[Extinguishment by lapse of time: Presumption as to improvement liens.] A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:

1. An action can be brought upon the principal obligation, or

2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.

Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates. [Enacted 1872; Am. Stats. 1945, ch. 361, § 1.]





No. 12371.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

F. E. THIBODO,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S REPLY BRIEF.

---

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## APPELLANT'S REPLY BRIEF.

---

### Preface.

Most of the argument presented by the Government are fully covered in appellant's opening brief. We will proceed to discuss any new points presented after first calling to some erroneous statements of fact.

### Misleading Statements of Fact.

At pages 2, 10 and 13 of appellee's brief it is asserted that plaintiff does not contend that he did not have actual knowledge of the condemnation proceeding. It is true that plaintiff neither specifically pleaded knowledge of the existence of the condemnation suit, or lack of knowledge, unless the absence of knowledge be inferentially comprehended in the allegation: "or any other act savoring of due process of law." [Tr. p. 4.]

If the statement in the Government's brief is intended to mean that the appellant concedes that he had knowledge

of the condemnation suit, then we now assert that appellant will be able to prove that he had no knowledge of the suit until after the judgment in condemnation and the payment of the awards, but that the Attorneys for the Government at the time the suit in eminent domain was filed, knew that the bonds of plaintiff were outstanding and unpaid, and that plaintiff was the owner thereof.

Under the circumstances we attach no importance to these facts. It is a matter of common practice to omit as defendants the owners of statutory liens in the expectation that in the drafting of the judgment the amounts sufficient to satisfy the liens will be deducted. In this case it could be done in several ways, the most usual of which would be to withhold from the awards a sufficient sum to make a payment to the City Treasurer's office and thereby cancel the bonds. Therefore, we think it should clearly appear that even though a bondholder had knowledge of the suit, he could not know or assume that the condemnor did not intend to so protect itself against outstanding liens of record.

The fact that the suit brought by the Government was one to obtain title to the lands in fee simple absolute neither supports, nor detracts from, the logic of our position in this respect.

As to the need for the plaintiff to plead knowledge, or lack of it, it is the general law of all States and Jurisdictions in this land that matters of waiver and estoppel are matters of defense, and that it is unnecessary for the pleader to negative possible defenses.

We further submit that under the judgment and findings in this case [Tr. p. 21] any allegation respecting knowledge on the part of the plaintiff as to any pending suit, would have been utterly useless.

It is true that the Government in its motion to dismiss asserted that the plaintiff had notice of the pendency of the condemnation action [Tr. p. 12], but no evidence was offered or received [Tr. p. 31] and there was no finding respecting it. [Tr. p. 21.]

The nature of the findings and the judgment is such that the trial court has inferentially determined that, had the plaintiff attempted to be impleaded in the condemnation action, he would not have been entitled to be heard, to share in the compensation, or to participate in any relief. [Tr. p. 21, Finding I.] Further, the trial court, at the time of the hearing of the motion [Tr. p. 35] in effect declared that the existence of plaintiff's bonds is of no concern to the Government, and that the plaintiff was not a necessary party, nor did he have any direct interest. [Tr. p. 40.]

The position of counsel for the Government is therefore inconsistent. They rely upon a judgment which has determined that the plaintiff was not entitled to be made a party defendant, nor served with process, or to be heard in the matter of just compensation. Now they urge upon this Court of Appeals that his rights are lost because he failed to appear in the action.

The trial court in its finding declared that the plaintiff was a proper, but not necessary party. [Tr. p. 21.] When in the same finding it also determined that the plaintiff was not entitled to be heard in the matter of compensation for the property taken it adjudicated that he was neither a proper nor necessary party. His interest could thereby be destroyed under a nominal judgment of compensation and the rights guaranteed to him by the Fifth Amendment to the Constitution would be meaningless.

## The Misleading Statement That the Improvement Act of 1911 Imposes on the City of National City the Duty of Collecting the Bond Fund and Paying It Out to the Bond-Holder.

On page 8 of the Government brief it is asserted that since the Improvement Act of 1911 makes the City of National City a trustee for the bond-holders in the collection and disbursement of the bond fund, and since the City was a party defendant to the condemnation action, there is a complete compliance with the law.

This statement of course is a matter of defense without anything in the record to support it, and our reply should be regarded in the same category. The court might well be reluctant to accept at face value such statements on the part of either counsel. If the record is important it should be transmitted.

Under the Improvement Act of 1911, it is the *City Treasurer, not the City*, who is a trustee, in the collection and disbursement of the bond funds. He does this in an extraordinary capacity distinct from his general official duties. He was not a party to the condemnation suit. The City, as a City, was in no way obligated with respect to the bonds, and had no duties to perform concerning them. It, of course does have a supervisory control over the City Treasurer and his office, in order that the fund ~~of~~ the City and the Public may be protected and official duty performed. Such is the character of the litigation involved in *Municipal Bond Co. v. City of Riverside*, cited by defense counsel, and reported in 4 Cal. App. 2d 442.



**The Fallacious Argument on Page 8 of the Government Brief, That While the Lien of the Assessment May Be Notice to the World, the Bond Issued Upon It Is Not.**

Inasmuch as the lien of the assessment under the statute continues until it is paid, and constitutes notice to all the world, it matters not whether we say that it is the lien of the assessment, or the lien of the bond, that compelled the condemnor to take notice of our interest. This statement is in full accord with the decision of the Supreme Court of California in *Thompson v. Clark*, 6 Cal. 2d p. 285, at p. 298, 57 P. 2d 490, where it is held:

“We have heretofore pointed out that by the terms of the Act of 1911 the issuance of bonds does not constitute payment or discharge of the assessment. The assessment is not paid in full until the bond which represents it is paid in full.”

**A Review of Appellee's Position and the Consequences They Contend Must Follow.**

It is asserted, and confirmed by the judgment, that the plaintiff's bonds are not interests of record of which notice must be taken at any stage of a condemnation action. It is urged, *without record evidence to support it*, that plaintiff had knowledge of the eminent domain action and his rights are lost unless he intervenes. It is contended, that, although plaintiff brought his action within the six years allowed for the prosecution of a suit against the Government, he has lost his rights because he has not attempted to foreclose his bonds under the provisions of a State statute. Almost in the same breath they declare that an

action of foreclosure cannot be maintained against the Federal Government, and that the filing of the suit, the declaration of taking, the deposit, and the order of immediate possession vests title in the Government, at least to the extent of the interests comprehended and included. They admit that when this took place plaintiff's bonds were not affected by any statute of limitations of the State. Nevertheless they devote considerable space to the State statutes and the decisions applicable thereto, with the suggestion that we cannot preserve our lien despite the State law. (Br. p. 14.)

We are not attempting to preserve our lien despite the State law, because the law of the State is no longer applicable, and the Federal jurisdiction has attached. For the plaintiff to foreclose would be but the performance of an idle act. We are not now even dealing with a lien, in foreclosure or in any other way. We are only taking advantage of our right to sue the Government as provided by the law and the Constitution. This is the measure and the limitation of the right. We sued within the purview of this law, and we sued within the allowable time.

Since for the reasons outlined the State statute of limitation, adopted subsequent to the issuance of the bonds (App. Br. p. 14), is not a proper element of this case, we are not analyzing the court decisions relating to it. We do, however, contend that to give effect to such statute with respect to plaintiff's bonds would be to violate the Constitution of the United States.

This was not merely a case where there was no statute of limitation, and one was later adopted. The situation was that the State of California entered into a contract, as expressed in the bond, that the obligation of the bond shall remain a lien until paid. [Tr. p. 6.] Such a statute subsequently adopted would violate Article I, Section 10 of the Constitution of the United States in that it is a State law impairing the obligation of a contract.

Respectfully submitted,

GEORGE W. CROUCH,

*Attorney for Appellant.*



No. 12371.

IN THE

# United States Court of Appeals

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F. E. THIBODO,

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*Appellee.*

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## APPELLANT'S SUPPLEMENTAL BRIEF.

---

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JUN 5 1950

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## APPELLANT'S SUPPLEMENTAL BRIEF.

---

### Introduction.

We have already shown that by statutory enactment the appellant's bonds constitute a record interest in real property, which, with respect to notice to the world is tantamount to any other record interest. We have also called attention to the interpretation of this statute by the Supreme Court of California. We think this clearly establishes that the finding of the trial court in this action that such bonds afford no notice to the Federal Government is contrary to law. Upon that erroneous finding primarily rests the judgment from which we have appealed.

There Was No Service of Process on Any Trustee of Appellant's Interests Which in the Slightest Degree Affected His Rights.

The Government does not contend that the City Treasurer of National City who was directed under the law to collect and disburse the bond funds was ever served with process. They do however assert that the City of National City, as a municipal corporation, was served, and that such City is a statutory trustee with relation to plaintiff's bonds, and as such is entitled to appear and act for him, and bind his interests. The United States Court of Appeals, for the Ninth Circuit, in *Fox v. Pasadena*, 78 F. 2d 948, has rejected this contention. The Court there says:

"The basic error in the complaint is the assumption that the City is a trustee for the taxpayers of the District. The fact that the officers of the City act *ex-officio* for and on behalf of the District. They, not the City, are the trustees named by the statute."

Under the Improvement Act of 1911 all matters relating to the bonds and the bond fund are matters entrusted to the City Treasurer in a special capacity distinct from his general official duties. It is of no concern to the City as a municipality. No doubt the preservation of the fund against misuse by the City Treasurer, and a recoupment in such case against the City Treasurer's bondsmen would fall within the domain of the municipality.

**Even the City Treasurer Is Not a Trustee for the Holders of the Bonds in the Sense That He Is Allowed to Represent Them in Any Case Involving Their Rights of Property.**

Since there is no contention that the City Treasurer was made a party to the condemnation action, this question cannot become one of the issues of the case at bar. A discussion of it will nevertheless throw some light upon the general subject.

We do not believe that the City Treasurer, even had he been properly brought into the condemnation action, would have possessed any authority, directly or inferentially, to appear on behalf of the bond owners. The powers of all trustees, and especially statutory trustees, cannot exceed the power reposed. The power accorded by the statute is to collect from the property owner and disburse the collection to the bond owner, and nothing more. He cannot manage, sell or deal with the property.

The purpose of a condemnation action is to ascertain the value of specific property and to pay over that value as an incident to the exercise of the power of eminent domain. A proper defense entails the right and power to make use of the incidents of ownership. The City Treasurer has neither legal title to the bonds, dominion over them, nor tangible evidence thereof. He cannot in fact foreclose a bond without the direction of the owner. It is as untenable to suggest that he has a right to represent the bondholder in a condemnation action as it would be to assert that he has the power to represent the fee owner of the land on which the bond is a lien. If, in the construction of any trust, a trustee is totally without the right to exercise a particular power of his own volition, then such power cannot be involuntarily thrust upon him.

## A Further Discussion of Proceedings in Rem, or Quasi in Rem.

This is merely the doctrine of process directed against the thing involved in the action, or as against the thing in connection with a proceeding against the person. Always present is the enveloping shadow of the Fifth Amendment to the Constitution commanding that there be due process of law. In short there still must be such substantial substituted process as is reasonably capable of affording notice to the interests affected, and at the same time guarantee to them their day in court.

When, as in this case, Congress has directed a condemnation action to be brought against the persons having interests of record and those interests manifested by possession, with its appropriate declaration of taking, the mode so provided becomes the measure of the power, and a judgment in disregard of it has no binding force. A similar situation arose in *Follette v. Pac. L. & P. Corp.*, 189 Cal. 193, 208 Pac. 295, being an action in connection with the Land Title Act (Torrens Title). There the Court, quoting from an earlier decision, said:

“It is no doubt true that so far as substituted service upon a class of unknown claimants is permitted at all in proceedings which are merely *quasi in rem*, it rests upon the ground of necessity and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in cases which sustain the power to bind unknown owners by substituted service in actions of the character now under consideration.”

And again:

“The evident purpose of the act is to secure so far as possible actual notice of the proceedings to all known claimants by personal service if they reside and can be found within the state; by mailing if they cannot so be found or are nonresidents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to wilfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. . . . We are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property. . . . So construed the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.”

The decision is a very well-considered discussion, citing many decisions from other jurisdictions, and proceeds to hold that “due process of law” is not met when there is a failure to observe these principles.

### **Conclusion.**

We have heretofore declared that the arguments of the defense with respect to the plaintiff herein having been represented by a trustee in the condemnation action are without any supporting record (page 4, Appellant’s reply brief). We also suggested that if the record be important it should be transmitted. It may well be important in overcoming the arguments of government counsel which relate to matters unsupported by the record. We

suggest that it will disclose that the judgment in the condemnation action was entered in response to a stipulation between the Government and the owners of the land to which appellants bonds attached; that this very stipulation recognized the existence of the outstanding assessments and the existence of the obligation of those assessments.

Finally we submit that due process of law, as applied to condemnation, means a proceeding in accord with the authorization therefore, a proceeding that is based on proper notice and process, and one that affords an opportunity for a proper hearing in adherence to those rules and principles established in our system of jurisprudence for the protection of private rights. Under the trial court's findings [Tr. p. 21] it is determined that no such process, notice or hearing is essential; indeed it is in effect further declared that had this appellant appeared he would not have been entitled to be heard in the matter of the just compensation for the property taken. This appellant owned an interest constituting part of the property taken. His bonds, being a first lien under the law, were the very pinnacle of the aggregate property right.

Respectfully submitted,

GEORGE W. CROUCH,

*Attorney for Appellant,*

No. 12371

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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F. E. THIBODO,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Petition of Appellant F. E. Thibodo for a Rehearing;  
or for the Court, of Its Own Motion, to Correct Its  
Decision Filed Herein Under Date of February 15,  
1951.

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## Brief Statement of Grounds.

1. The decision is in error where on page 8 thereof, after declaring that the condemnor could have withheld the amount of the lien in favor of the rightful claimant, it declares "Just what was done in this regard the pleadings do not reveal."

The error consists in the fact that the pleadings do reveal what was done, as shown by transcript pages 4-9 and 10. Since this error substantially affects the final determination of the Court, we detail it in the argument.

2. The language of the decision on page 11 thereof that one seeking relief on constitutional grounds must first exhaust his State remedies is erroneous. The decision had previously declared that there was no remedy open to the plaintiff, save that of foreclosure, and the doors to that remedy were closed when the Government took the land.

3. The decision is in error on pages 11 and 12 thereof in its declarations with respect to following the condemnation fund. A single case, *Rose v. Conklin*, 52 Cal. App. 225, is cited, as authority therefor. The case has no application because the funds there were intact. It was simply a case of being subrogated to the award.

We urge that the right of the Government to follow an erroneous award has nothing to do with any limitation on the right of a citizen to take advantage of the benefits of the Fifth Amendment. The decision cites no other cases neither does it otherwise discuss the question.

4. The decision is in error in directing plaintiff to amend his complaint.

### Argument.

The decision of the Court upholds the Appellant's position that the Constitution guarantees to him compensation for his property taken for Public Use, and that where he has been deprived of his property in violation thereof, and without his day in court, he has a right of action within the meaning of Title 28 U. S. C. A., Sec. 1346(2). It overturns the finding of the trial court to the effect that the Government was under no obligation to make the Appellant a party defendant in a condemnation action directed against the property to which his bonds related, or to serve him with process. The decision also overturns the finding of the trial court to the effect that the City Treasurer's Record of the Plaintiff's bonds constituted neither actual nor constructive notice to the United States of the existence thereof, or rights of property arising thereunder.

The decision of this Court then proceeds to very correctly declare (pp. 6 and 7) that upon default in payment upon the bonds, two remedies are open to the bondholder; one a foreclosure through the City Treasurer, the other a suit in foreclosure in the court. Then the decision states: "Both of the above doors to recovery on his bonds were closed to the plaintiff when the United States exercised its power over the land in 1943."

The only construction to be accorded to this language is that the sole remedy in favor of the bondholder is one of foreclosure, and even that remedy becomes non-existent

whenever the United States has exercised its power over the land. Hence there is no possible remaining remedy which the plaintiff could thereafter exhaust.

Appellant first complains of an error of this Court in its decision, where (on p. 8 thereof) it states that the condemnor, having constructive knowledge of the bonds, could have withheld the amount of the lien for its rightful claimant, and concludes with the following statement:

“Just what was done in this regard the pleadings do not reveal.”

This statement overlooks the allegation of the plaintiff's complaint [Tr. p. 4] which sets forth that the condemnation action instituted by the Government “has proceeded to judgment, the payment by the Government of the awards thereby imposed, all without service of process upon this plaintiff, any appearance by him, any compensation to him, or any adjudication respecting it, or any other act savoring of due process of law.” Again on Transcript page 9 the plaintiff in his complaint declared “That the plaintiff was neither a party to said action No. 172-SD, nor was he ever served with summons. That no provision has been made for the payment of the bonds of the plaintiff, and no adjudication has been made respecting it. That plaintiff has never received any compensation for such bonds. That the defendant refuses to pay plaintiff anything in lieu thereof.”

Again [at Tr. p. 10] plaintiff alleged that there never had been any other action or proceeding on the part of the

United States to determine the rights of property of the plaintiff.

Appellant next complains of the language of the decision on page 11 thereof that one seeking relief for the violation of Constitutional rights must first exhaust his remedies in the State Courts (citing *Phyle v. Duffy*, 334 U. S. 431). The law of that decision could have no application here, for the reason that by virtue of the previous language of this Court of Appeals, in this very decision, there never existed any remedy save that of foreclosure, and the doors to that remedy were closed when the Government exercised its power over the land. Another reason is that it was a criminal case, involving alleged due process of law, and not a direct action against the Government for compensation.

We next complain of the decision on pages 11 and 12 thereof with respect to the lien of the claimant following the condemnation fund, in which it is declared that he may follow the fund even after it has been paid out to others. In support thereof the decision cites *Rose v. Conklin*, 52 Cal. App. 225. There are no other citations, or further discussion of this declaration. Whatever right might exist in any case could not constitute a defense to the violation of the constitutional right. Not even a trustee could defend the violation of a duty owed his *cestui que* trust on the ground that he had a right of recovery for funds wrongfully expended, much less to require the *cestui que* trust to pursue the malefactor, or follow the ownership of the funds *ad infinitum*.

Let us see however what *Rose v. Conklin*, *supra*, actually holds. On pages 230 and 231 they discuss whether the plaintiff might have injected herself into the condemnation

action and had her rights determined. They then say: "But the plaintiff was not bound to inject herself into that case."

There the plaintiff had begun her suit for foreclosure before the commencement of the condemnation action. She obtained a deed thereunder while the condemnation action was still pending. The appeal had not been determined nor the funds paid out (bottom of p. 231 and top of p. 232).

All this is only to the effect that having become again the sole owner of the land, she was entitled to be subrogated to the award.

We next complain of the declaration on page 12 of the decision to the effect that the plaintiff should be given an opportunity to amend his complaint to show that he has exhausted the State remedy or that this relief is not available to him, or pursuit thereof would be fruitless.

We have shown that the only remedy was of foreclosure and that is exhausted. We also have shown that the entire condemnation awards have been paid out and no provision made for the plaintiff and no compensation to him, and no adjudication respecting his rights. That leaves only one thing, and with respect to which, the next trial judge will be just as uncertain and confused as we are: namely, does the decision mean that we must plead that we have attempted by suit to follow the devious course of the moneys that have been paid out, respecting all of these bonds, or show that it would be fruitless to do so. This brings us to the point in the case that ought to be directly answered. That question stated as we conceive it to be is this: Is the mandate of the Fifth Amendment imposing on the Government the obligation of providing



compensation and conforming to due process of law a primary and unqualified one, or is the right dependent on the injured party being saddled with the delinquencies and mistakes made by the Government and being first forced to sue and exhaust his remedy against third parties before he can avail himself of his constitutional right.

Under our review of the decision, the above question is all that remains. If the plaintiff is right in his construction of the law the case should go to trial on the merits, and there is nothing requiring further amendment of the complaint.

At all events we believe that, in the interest of clarity, and for the purpose of resolving at this time all that is now properly before this Court, the opinion should be reconsidered and corrected.

If this can properly be done under the presentations and arguments of counsel already made, such corrections may afford a complete remedy; otherwise plaintiff asks for a rehearing on the grounds specified and herein argued.

Respectfully submitted,

F. E. THIBODO, *Appellant*,

By GEORGE W. CROUCH,  
*His Attorney.*

### **Certificate of Counsel.**

The undersigned, George W. Crouch, who is attorney of record for the plaintiff in the above entitled action, and on appeal from a judgment of dismissal entered therein by the lower court, does hereby certify to the United States Court of Appeals, for the Ninth Circuit, that in his judgment the petition is well founded, and the grounds presented in support thereof meritorious, and that the petition is not interposed for delay.

GEORGE W. CROUCH.

Dated February 28, 1951.

No. 12374

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United States  
Court of Appeals  
For the Ninth Circuit.

---

ROBERT L. CANNON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court  
Southern District of California,  
Central Division.

FILED

JAN 10 1950

PAUL P. O'BRIEN,  
CLERK



No. 12374

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United States  
Court of Appeals  
For the Ninth Circuit.

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ROBERT L. CANNON,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court in and for the  
Southern District of California, Central Division

No. 20507

[Selective Service Act of 1948—Failure to register]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT L. CANNON,

Defendant.

### INDICTMENT

The grand jury charges:

Defendant Robert L. Cannon, a male person within the class required to register for selective service under the Selective Service Act of 1948, on or about September 9, 1948, and at all times thereafter, in Los Angeles County, California, within the Central Division of the Southern District of California, did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he knowingly failed and neglected to register as required by said act and regulations.

A True Bill:

/s/ A. S. AHLWEDE,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

RHK:AH

[Endorsed]: Filed Jan. 19, 1949.

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the Seventh day of February in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Wm. C. Mathes,  
District Judge.

[Title of Cause]:

For plea; A. P. Moran, Ass't U. S. Atty., appearing as counsel for Gov't; J. D. Randles, Esq. appearing as counsel for defendant, who is present on bond; reading of Indictment is waived and defendant pleads not guilty. Court orders cause set for trial March 8, 1949, 10 AM, with a jury. [3]

---

### DEFENDANT'S INSTRUCTION NO. 15

Ladies and Gentlemen of the Jury:

The Court further instructs you that because of the First Amendment of the Constitution of the United States, which, as heretofore you have been instructed, reads in part as follows:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”

and it having been stipulated that this defendant's

failure to register was due to the exercise of his religious motives, you are instructed that so far as this defendant is concerned, the Selective Service Act of 1948 is unconstitutional and you should bring in a verdict of not guilty.

Given:

.....

Judge. [4]

—

### DEFENDANT'S INSTRUCTION NO. 14

Ladies and Gentlemen of the Jury:

You are instructed that when a matter has been stipulated to by counsel representing the Government and the defendant, it is no longer an issue in this case. In that connection, I would instruct that it has been stipulated to: First, that the defendant did not register under the Selective Service Act of 1948, and it has been further stipulated that his non-registration was because of his exercise of his religious convictions.

Given:

.....

Judge.

[Endorsed]: Filed June 2, 1949. [5]

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

(Given June 2, 1949.)

/s/ WM. C. MATHES,  
Judge. [6]

[1]

Members of the Jury:

You have heard the evidence and the argument. Now it is the duty of the Court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

[Form Cr. 1—Civ. 1]

[MATHES, J.]

[Province of the Court]

## [2]

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

[Form Cr. 2]

[Province of the Jury]

[MATHES, J.]

[Indictment an Accusation]

## [3]

The law presumes a defendant to be innocent of any crime. This presumption of innocence continues throughout the trial, and has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant, unless the presumption is outweighed by evidence satisfying the jury beyond a reasonable doubt of the defendant's guilt.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the

state of evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty that a defendant is guilty of the charge.

[Presumption of Innocence]

[Form Cr. 3]

[Burden of Proof]

[MATHES, J.]

[Reasonable Doubt]

[4]

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye witness. The other is circumstantial

evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In order to justify a verdict of guilty based in whole or in part upon circumstantial evidence, the facts in the chain of circumstances shown by the evidence must be consistent with the guilt of the accused, and inconsistent with every reasonable supposition of innocence.

If the facts and circumstances shown by the evidence are as consistent with innocence as with guilt, the jury should acquit the accused. [10]

[Form Cr. 4]

[Direct Evidence]

[MATHES, J.]

[Circumstantial Evidence]

[5]

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presump-



tions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed the jury are bound to find in accordance with the presumption. [11]

	[Evidence]
	[Stipulations]
[Form Cr. 5]	[Inferences]
[Mathes, J.]	[Presumptions]

[6]

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the

manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves. [12]

[Form Cr. 6—Civ. 6]      [Credibility of Witnesses]  
[MATHES, J.]      [Discrepancies in Testimony]

## [6-A]

All evidence relating to any admission or incriminatory statement claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care. [13]

[Form Cr. 6-A]

[MATHES, J.]

[Admissions]

## [6-B]

A confession is an admission by a defendant of all the facts constituting the crime charged. The very nature of a confession requires that the circumstances surrounding it be subjected to careful scrutiny in order to determine surely whether it was voluntarily made.

If the evidence does not convince beyond all reasonable doubt that a confession was made voluntarily, the jury should disregard it entirely. On the other hand, if the evidence does show beyond a reasonable doubt that a confession was voluntarily made by a defendant, the jury should consider the confession as evidence for all purposes. [14]

[Form Cr. 6-E]

[MATHES, J.]

[Confession]

## [7]

A witness may be impeached or discredited by contradictory evidence; or by evidence that at other times the witness has made statements which are

inconsistent with the witness' present testimony.

If you believe any witness has been impeached, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. [15]

[Impeachment—

[Form Cr. 7—Civ. 7] inconsistent statements—  
[MATHES, J.] falsus in uno falsus in omnibus]

[8]

“In [the] trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. [But] His failure to make such request shall not create any presumption against him.” [18 U.S.C., § 3481.]

[That is to say, the law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. [6]

[Form Cr. 8]

[MATHES, J.] [Failure of Accused to Testify]

[8-A]

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness. [17]

[Form Cr. 8-A]

[MATHES, J.]

[Credibility of Accused]

[9]

In every crime there must exist a union or joint operation of act, or failure to act, and intent. The burden is always upon the prosecution to prove both act, or failure to act, and intent beyond a reasonable doubt.

A person is held to intend to do or fail to do everything such person knowingly does in fact do or fail to do. A person is also held to intend all the natural and probable consequences of whatever such person knowingly does or fails to do. That is to say, the law assumes every person to intend the consequences which one standing in like circumstances and possessing like knowledge would reasonably expect to result from acts knowingly done or knowingly omitted.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason. [18]

[Form Cr. 9-A]

[MATHES, J.]

[Omission and Intent]

## [9-A]

With respect to lesser offenses, if it be shown that a person has voluntarily committed an act denounced by law as a crime, intent may be presumed from the mere doing of the forbidden act.

But with respect to major crimes, such as charged in this case, proof of specific intent is required before there can be a conviction. Specific intent, as the term suggests, means more than a mere general intent to commit the act.

A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law commands, purposely intending to violate the law or recklessly disregarding the law, acts with specific intent. [19]

[Form Cr. 9-B]

[MATHES, J.]

[Specific Intent]

## [9-B]

It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Nor is ignorance of the law available as a defense to a person who has committed a crime. Everyone is presumed to have knowledge of what the law forbids and what the law commands. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered in determining

whether or not the accused acted or failed to act with specific intent as charged. [20]

[Form Cr. 9-C]

[MATHES, J.]

[Ignorance of the Law]

[9-C]

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive is never a defense where the act done is a crime. If a person does intentionally an act which the law denounces as a crime, motive is immaterial. [21]

[Form Cr. 9-D]

[MATHES, J.]

[Motive]

[10]

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do

may indicate intent or lack of intent to commit the offense charged.

Intent may be inferred from all the evidence in the case, including any acts done and statements made by the accused. The jury should consider all the facts and circumstances in evidence which may aid determination of the issue as to intent. [22]

[Form Cr. 10]

[MATHES, J.]

[Proof of Intent]

[11]

It is charged in the indictment that on or about September 9, 1948, and at all times thereafter, in Los Angeles County, California, the defendant, Robert L. Cannon, was a male person within the class required to register for selective service under the Selective Service Act of 1948, and that the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder, in that he then and there knowingly failed and neglected to register as required by said act and said regulations.

[12]

Section 453 of Title 50 of the United States Code provides in part that:

“ . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registra-



tion, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." [Act, Title I, § 3, 62 Stat. 605.]

## [12-A]

Proclamation No. 2799, issued July 20, 1948, by the President of the United States, provides in part that:

1. The registration of male citizens of the United States and other male persons residing in the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place . . . between the hours of 8:00 a.m. and 5:00 p.m. on the day or days hereinafter designated for their registration, as follows: \* \* \*

(e) Persons born in the year 1926 shall be registered on Wednesday, the 8th day of September, 1948, or on Thursday, the 9th day of September, 1948.

\* \* \*

2. (a) Every male citizen of the United States . . . who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed

herein for his registration is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

\* \* \*

3. Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith." [13 F.R. 4173] [25]

[12-B]

Section 462(a) of Title 50 of the United States Code provides in part that:

"Any . . . person charged . . . with the duty of carrying out any of the provisions of . . . [The Selective Service Act of 1948], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses registration . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this [Act], or rules, regulations, or directions made pursuant to this Act . . ." shall be guilty of an offense.

## [12-C]

The Selective Service Act of 1948 was passed by the Congress of the United States pursuant to authority granted by the Federal Constitution to provide for our national defense.

You are not to be concerned with the wisdom or desirability of the Selective Service Act of 1948. It is the law of the land and, as jurors, you must be governed by it and apply it in arriving at an impartial verdict in this case. [27]

## [12-D]

Persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form, including duly ordained ministers of religion and students preparing for the ministry, are not exempted from registration under the Selective Service Act of 1948.

Once they are registered, however, such persons may be exempted from training and service under the Act. In this connection § 456(j) of Title 50 of the United States Code provides in part that: "Nothing contained in [the Selective Service Act of 1948] . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

But in order to avail themselves of such exemp-

tion from training and service, the law provides that conscientious objectors must first register as required by the Act. [28]

[13]

Thus, there are two essential elements of the offense charged in the indictment:

First: Whether the defendant was, at the time and place alleged in the indictment, a male person within the class required to register for selective service under the Selective Service Act of 1948; and

Second: Whether the defendant knowingly failed and neglected to register as required by said Act and the regulations promulgated thereunder.

As stated before, the burden is upon the prosecution to prove beyond all reasonable doubt every essential element of the crime charged. [29]

[14]

You will note that the omission or failure to act charged in the indictment is alleged to have been “knowingly” done.

The purpose of adding the word “knowingly” to the statute was to insure that no one would be convicted because of mistake or inadvertence or other innocent reason. [30]

## [14-A]

The First Amendment to the Federal Constitution declares that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The defendant's religious beliefs are within the protection of the First Amendment, but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs. The United States has the constitutional power to require the registration of all male citizens between the ages of eighteen and twenty-six, as the Selective Service Act of 1948 provides, and the exercise of such power in accordance with the Act does not constitute an abridgement of the freedom of religion of any person. [31]

## [14-B]

In the words of the late Mr. Justice Cardozo of the United States Supreme Court:

“Never in our history has the notion been accepted, . . . that acts . . . indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. . . .

“Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.”

[Concurring opinion of Mr. Justice Cardozo in *Hamilton v. Regents*, 293 U. S. 245, 267-268 (1934).]

[15]

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts. [33]

[Form Cr. 15—Civ. 15]  
[MATHES, J.]

[Court's Comments  
on Evidence]

[16]

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts

not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts. [34]

[Form Cr. 16—Civ. 16]  
[MATHES, J.]

[Court's Questions  
to Witnesses]

[16-A]

It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case. [35]

[Form Cr. 16-A—Civ. 16-A]  
[MATHES, J.]

[Court's Comments  
to Counsel]

[17]

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

[Form Cr. 17]  
[MATHES, J.]

[Punishment]

[17-A]

The defendant is not on trial for any act or conduct not alleged in the indictment. [37]

[Form Cr. 17-C]

[MATHES, J.] [Consider only offense charged]

[18]

The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become



involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

[Form Cr. 18—Civ. 18]	[Verdict, Unanimous]
[MATHES, J.]	[Duty to Deliberate]

[19]

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction.

If the accused be proved guilty, say so. If not proved guilty, say so. Remember at all times that a defendant is entitled to acquittal if any reasonable doubt remains in your minds.

Remember also that the question before you can never be: will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

If it becomes necessary during your deliberations to communicate with the Court, you may send a

note by the bailiff. But bear in mind you are not to reveal to the Court or any person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict. [39]

[Form Cr. 19]

[Judging the Evidence]

[MATHES, J.] [Jury's Communications to Court]

[20]

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

A form of verdict has been prepared for your convenience.

[Form of verdict read.]

You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form to state the verdict upon which you agree, and then return with your verdict to the court room. [40]

[Election of Foreman]

[Form Cr. 20]

[Form of Verdict]

[MATHES, J.]

[Single Defendant]

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find the defendant, Robert L. Cannon, Guilty as charged in the indictment.

Los Angeles, California.

June 2, 1949.

/s/ THOMAS B. PERRU,

Foreman of the Jury [41]

[Endosed]: Filed June 2, 1949.

District Court of the United States for the Southern  
District of California, Central Division

No. 20507—Criminal. Indictment [1 Count—Selective Service Act of 1948—Failure to Register]

UNITED STATES OF AMERICA

vs.

ROBERT L. CANNON

### JUDGMENT AND COMMITMENT

On this 9th day of June, 1949, came the attorney for the government and the defendant appeared in person and with his attorney, J. D. Randels, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and finding of guilt by the jury of the offense of having on or about September 9, 1948, failed to register as required by the Selective Service Act of 1948, as charged in the indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years in an institution to be se-

lected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 2 P.M. on June 17, 1949.

It Is Further Adjudged that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 2 P.M. on June 17, 1949.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,

United States District Judge.

By /s/ LOUIS J. SOMERS,

Deputy Clerk.

/s/ EDMUND L. SMITH,

Clerk.

Filed June 9, 1949. [42]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Comes now the above-named defendant and appellant and files this his Notice of Appeal from the above-entitled Court to the Circuit Court of Appeal for the Ninth Circuit from judgment as follows, to-wit:

The name of the appellant is Robert L. Cannon, whose address is 417 East 30th Street, Los Angeles, California. His attorney's name and address is James D. Randles, 818 Transamerica Building, Los Angeles 14, California.

The appellant has been convicted of the crime of violating the Selective Service Act of 1948, Title 50, Section 453.

The concise statement of judgment or order giving date and any sentence:

Appellant was convicted by a jury on June 2, 1949, and was on June 9, 1949, given a sentence of imprisonment for three (3) years in an institution to be selected by the Attorney General of [43] the United States, or his authorized representative.

That this appellant is now on bail, the execution of said sentence having been stayed to June 17, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeal for the Ninth Circuit from the above stated judgment.

Dated, this 10th day of June, 1949.

/s/ ROBERT L. CANNON,

Appellant.

/s/ JAS. D. RANDLES,

Attorney for Appellant.

[Endorsed]: Filed June 10, 1949. [44]

[Title of District Court and Cause.]

STIPULATION RE: DESIGNATION OF THE  
RECORD AND PRAECIPE

It Is Hereby Stipulated between the attorneys for the parties in the above-entitled action that the following shall be the record on appeal and the Clerk is hereby requested to prepare same:

1. Indictment.
2. Plea.
3. Verdict of the jury.
4. Judgment and commitment.
5. Instructions, as read.
6. Further requested instructions.
7. Notice of appeal.
8. This Stipulation, and Praecipe.
9. Reporter's Transcript.

Dated, July 15, 1949.

JAMES M. CARTER,  
United States Attorney.

By /s/ SANDER L. JOHNSON,  
Attorney for Plaintiff and  
Appellee. [46]

/s/ JAS. D. RANGLES,  
Attorney for Defendant and  
Appellant.

[Endorsed]: Filed June 15, 1949. [47]

[Title of District Court and Cause.]

### STIPULATION AND ORDER

It Is Hereby Stipulated, by and between James D. Randles, attorney for appellant, and James M. Carter, attorney for the United States, that the appellant may have until to and including the 10th day of August, 1949, in which to prepare and certify the record on appeal in the above-entitled matter.

Dated, this 15th day of July, 1949.

JAMES M. CARTER,

United States Attorney.

By /s/ SANDER L. JOHNSON,

Attorney for Plaintiff and  
Appellee.

/s/ JAS. D. RANGLES,

Attorney for Defendant and  
Appellant. [48]

### ORDER

Upon reading the above Stipulation, it is so ordered.

/s/ WM. C. MATHES,

Judge of the District Court.

Dated, July 19, 1949.

[Endorsed]: Filed July 20, 1949. [49]



[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas; The deputy United States District Attorney who represented the plaintiff in the trial of the above-entitled matter is absent from the city and will not return for a period of approximately thirty days and because his assistance is necessary in the preparation of the record on appeal,

It Is Hereby Stipulated, by and between James D. Randles, attorney for appellant, and James M. Carter, attorney for the United States, that the appellant may have to and including the 10th day of October, 1949, in which to have prepared and certified the record on appeal in the above-entitled matter.

Dated, this 4th day of August, 1949.

JAMES M. CARTER,

United States Attorney.

By /s/ NORMAN W. NEUROM,

Attorney for Plaintiff and

Appellee.

/s/ JAS. D. RANGLES,

Attorney for Defendant and

Appellant. [50]

ORDER

Upon reading the above Stipulation, it is so ordered.

/s/ LEON R. YANKWICH,

Judge of the District Court.

Dated, August 4th, 1949.

[Endorsed]: Filed Aug. 4, 1949. [51]

United States District Court in and for the Southern  
District of California, Central Division

No. 20507 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT L. CANNON,

Defendant.

REPORTER'S TRANSCRIPT OF TESTIMONY  
AND PROCEEDINGS OF TRIAL

Honorable William C. Mathes, Judge presiding.

Appearances:

For the Government: .

JAMES M. CARTER,

United States Attorney; by

SANDER L. JOHNSON,

Assistant United States Attorney.

For the Defendant:

J. D. RANGLES, Esq.,

Transamerica Building,

Seventh and Olive Streets,

Los Angeles 14, California. [1\*]

June 1, 1949, 10:00 O'clock A.M.

(A jury having been heretofore selected and  
sworn, the following proceedings were had:)

(Case called by clerk.)

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\* Page numbering appearing at top of page of original Reporter's  
Transcript of Record.

Mr. Johnson: Ready for the government.

Mr. Randles: Ready for the defendant.

The Court: I understand a jury has been impaneled in this case by Judge Weinberger. Judge Weinberger was called out of the city today on account of a death in his family, and I am handling the criminal matters in his absence.

Do you gentlemen wish to stipulate that this trial may proceed before me with same effect as if it had proceeded before Judge Weinberger?

Mr. Johnson: The government so stipulates, your Honor.

Mr. Randles: The defendant will so stipulate, your Honor.

The Court: Is that satisfactory to you, Mr. Cannon?

Defendant Cannon: Yes.

The Court: Ladies and gentlemen, you have been impaneled and sworn as jurors to try the case of United States of America, plaintiff, vs. Robert L. Cannon, defendant.

Is it stipulated, first, that all members of the jury are in their places?

Mr. Randles: Yes, sir. [2]

Mr. Johnson: So stipulated.

The Court: By an indictment, filed in this court January 19, 1949, No. 20507, the grand jury charges that the defendant Robert L. Cannon, a male person within the class required to register for selective service under the Selective Service Act of 1948, on or about September 9, 1948, and at all times there-

after, in Los Angeles County, California, within the Central Division of the Southern District of California, did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he knowingly failed and neglected to register as required by said Act and regulations.

By his plea of not guilty, the defendant has placed in issue the allegations of the indictment, and you have been impaneled and sworn as jurors to try the cause.

Does the government wish to make an opening statement?

Mr. Johnson: Yes, your Honor.

Ladies and gentlemen of the jury, counsel for the government desires to make a brief statement. I think that the indictment itself, as Judge Mathes has read it to you, contains, in itself, the elements of the crime. And, as the Judge stated, in this case the only things that are in issue are the allegations contained in the indictment.

What I am about to say is not evidence but is merely or mainly to help you in analyzing the case as you go along. [3]

If you consider the indictment which the Judge just read to you, you will see that there are two elements of the crime charged in this case and they are, first, a duty required of the defendant under the Selective Service Act of 1948, namely, registering as required by that Act and regulations issued thereunder. I think all of you probably realize

that the Selective Service Act of 1948 was passed in 1948 and that it has to do with the drafting of male citizens into the armed forces, during what Congress regarded as somewhat of an emergency.

The other element of the offense charged is that the defendant knowingly failed and neglected to register as that Act did require of him.

The government will proceed to bring forth evidence to prove those two points and, of course, will limit itself to those issues because those are the issues in this case and we believe the only issues. I thank you.

The Court: Does the defendant wish to make an opening statement?

Mr. Randles: I believe not, your Honor.

The Court: Very well. You may call the first witness on behalf of the government.

Mr. Johnson: Your Honor, I would like to submit some documents to be marked for identification at this time in the order that they are presented.

The Court: You may. [4]

The Clerk: A document, purporting to be a certified copy of birth record of Robert Lawrence Cannon, recorded in Book 157, page 465, of the Records of Alameda County, California, is Exhibit 1. Exhibit 2 for identification is a letter purporting to be signed "Robert L. Cannon," addressed to Central Draft Registration Center, 1206 South Santee Street, Los Angeles, California, dated September 5, 1948. Exhibit 3 for identification is a three-page handwritten statement, purporting to

be signed "Robert Lawrence Cannon." Exhibit 4 for identification purports to be a letter, dated September 27, 1948, to Walter H. Henderson, care of Director of Selective Service, 1209 Eighth Street, Sacramento 14, California, purporting to be signed "Robert L. Cannon."

Mr. Johnson: At this time the government offers in evidence a document marked Government's Exhibit No. 1 for identification, by stipulation with counsel for the defendant that it is what it purports to be.

The Court: A birth certificate?

Mr. Johnson: Yes, your Honor.

The Court: Do you stipulate it to be a genuine copy of the defendant's birth certificate?

Mr. Randles: Yes, your Honor.

The Court: Very well. It will be received in evidence as Plaintiff's Exhibit 1.

The Clerk: So marked. [5]

Mr. Johnson: Your Honor, may I state the substance of this to the jury?

The Court: You may pass it to the jury or state the substance of it.

Mr. Johnson: Government's Exhibit No. 1 purports to be a certified copy of the birth record of a child, Robert Lawrence Cannon, born in Alameda County, Oakland, California; father of child, Lawrence E. Cannon; mother of child, Edyth M. Marston; date of birth, January 19, 1926, 6:00 a.m. I will pass it to the jury.

At this time the government calls Myrtle Winchester.

MYRTLE WINCHESTER

called as a witness on behalf of the government,  
being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Myrtle Hayes Winchester.

Direct Examination

By Mr. Johnson:

Q. Mrs. Winchester, where do you reside?

A. My home address is 1411 North Fuller Avenue.

Q. And what is your occupation?

A. I am a coordinator of Local Board D, Selective Service System.

Q. And where is your office located in that capacity?

A. My office is at 1206 Santee Street, Los Angeles. [6]

Q. What, generally speaking, are the duties of that position?

Mr. Randles: If the court please, may I interrupt for just a moment?

Counsel, if it is for the purpose of establishing the fact that the defendant did not register, we will so stipulate for the purpose of saving time.

Mr. Johnson: Very well.

The Court: The stipulation, as I understand, is that the defendant has never registered under the Selective Service Act of 1948?

Mr. Randles: That is right.

(Testimony of Myrtle Winchester.)

The Court: Do you accept the stipulation?

Mr. Johnson: Yes, your Honor.

The Court: The jury will understand it is agreed as a fact that the defendant has never registered under the Selective Service Act of 1948. Is there anything further from this witness?

Mr. Johnson: Here is a letter that the witness received, and I thought perhaps we could get that in at this time.

Mr. Randles: Counsel, I will stipulate—it was sent to the witness, was it?

Mr. Johnson: Yes.

Mr. Randles: I will stipulate to it and that you may read it to the jury. [7]

Mr. Johnson: The government offers in evidence Government's Exhibit No. 2 for identification.

The Court: It will be received in evidence pursuant to the stipulation.

The Clerk: So marked.

Mr. Johnson: I will read it to the jury. It is a typewritten letter. "417 East 30 Street, Los Angeles 11, Calif. September 5, 1948. Central Draft Registration Center, 1206 South Santee Street, Los Angeles, Calif.

"Dear Sirs:

"This to notify you that I am refusing to register for the draft. My conscience, nurtured in the Christian doctrine of love, non-violence, and forgiveness will not permit me to align myself with the



(Testimony of Myrtle Winchester.)

Selective Service system, which I consider unjust and un-Christian.

Signed, Robert L. Cannon. Age, 22 years."

The "Robert L. Cannon" is the signature and typewritten is "Robert L. Cannon, 417 East 30 Street, Los Angeles 11, Calif."

The government has no further questions in that case of the witness.

The Court: The witness may step down.

Mr. Johnson: May the witness be excused?

Mr. Randles: Yes.

Mr. Johnson: That is all, Mrs. Winchester. Will counsel [8] stipulate as to this document?

Mr. Randles: Yes, sir.

Mr. Johnson: The stipulation of counsel for the defendant is to the effect that Government's Exhibit No. 3 for identification is a statement taken voluntarily from the defendant, by authority of the Federal Bureau of Investigation. We offer said exhibit or said document in evidence.

The Court: What is the number of the exhibit?

Mr. Johnson: No. 3.

Mr. Randles: No objection.

The Court: Very well. It may be received pursuant to that stipulation. May it?

Mr. Randles: Yes, sir.

The Court: Exhibit 3 for identification is received in evidence.

Mr. Johnson: I will read it to the jury, your Honor.

(Testimony of Myrtle Winchester.)

The Court: You may.

Mr. Johnson: "Page 1," a handwritten statement, "I, Robert Lawrence Cannon, having been previously advised by Special Agents Joseph Backus and Henry C. Johnson of the Federal Bureau of Investigation, whose credentials as such were exhibited by them to me, that I do not have to make this or any statement, that the statement can be used against me in court, and that I have the right to be represented by legal counsel, make the following statement freely and voluntarily [9] without any threats or promises having been made to me.

"I presently reside at 417 E. 30th St., Los Angeles. I have resided here since 1939. I am a native-born U. S. citizen. I was born Jan. 19, 1926, Oakland, California. My parents were Edith Dotson, deceased, and Lawrence Cannon. I knowingly and intentionally did not register for Selective Service under the Selective Service Act of 1948 either on the dates provided for my registration or at any time since. I was at the time designated for my registration aware of and acquainted with the provisions of the Selective Service Act requiring me to register. I also was and am aware of the provisions of the Act in regard to ministers and conscientious objectors.

"I have at all times refused and still continue to refuse to register for Selective Service under the present Act of 1948. I am not nor have I ever been a member of any of the Armed Forces of the

(Testimony of Myrtle Winchester.)

U. S. About Sept., 1944 I registered for Selective Service under the Act of 1940 at the Local Draft Board located on S. Hill St., Los Angeles, between Adams and 29th Sts. I was given a 4-F Classification because of a tumor on my right knee which has since been removed. I presently am not aware of any physical defects or disabilities which would exempt me from military service. My civil status is single and I do not have any dependents.

"I feel that the Selective Service Act of 1948 is unjust [10] and un-Christian and for that reason I refuse to register, although I realize that I am one of the persons whom the law requires to register.

"I have read this statement which consists of this page, a preceding page, and a page following, which bears my signature, all of which I have initialed and declare that this statement is the truth and incorporates the substance of my statements to the above Special Agents of the F. B. I. I have made this statement freely and voluntarily without any threats or promises having been made to me. I am aware of the fact that I do not have to make this statement, that it can be used against me in court, and that I have a right to be represented by legal counsel."

Signed, "Robert Lawrence Cannon, January 5, 1949, Los Angeles, Calif.

"Witnessed: Henry C. Johnson, Special Agent of the Federal Bureau of Investigation.

(Testimony of Myrtle Winchester.)

“Joseph B. Backus, Special Agent of the Federal Bureau of Investigation.”

With the stipulation of counsel for the defense that Government's Exhibit No. 4 for identification represents a letter written by the defendant to Walter H. Henderson of the Selective Service authorities in Sacramento, California, the government offers in evidence Exhibit No. 4.

The Court: Does counsel so stipulate? [11]

Mr. Randles: Yes, your Honor.

The Court: Very well. Exhibit 4 for identification is received in evidence.

Mr. Johnson: I will read this to the jury, your Honor.

The Court: You may.

Mr. Johnson: “417 East 30th Street, Los Angeles 11, Calif. September 27, 1948.

“Walter H. Henderson, care Director of Selective Service, 1209 Eighth Street, Sacramento 14, Calif.

“Re: 2-7.

“Dear Mr. Henderson:

“Thank you for your letter and the advice rendered. I have no intention, however, of altering my position, i.e., of refusing to register for the draft. I am quite aware of the possible consequences of my action. But as a Christian who believes it mandatory to put into daily practice the teachings of Jesus, I agree with Paul, who says we ought to obey

(Testimony of Myrtle Winchester.)

God rather than man.

“Thank you again.

“In His service,

“Robert L. Cannon,” with the signature.

The government rests, your Honor.

Mr. Randles: Will the defendant take the stand, please? [12]

### ROBERT L. CANNON

the defendant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Robert Lawrence Cannon.

### Direct Examination

By Mr. Randles:

Q. Mr. Cannon, you are the defendant in this action? A. Yes.

Q. You have heard the letters that have been read here, that you wrote? A. I have.

Q. You wrote those letters? A. I did.

Q. In those letters you stated that you did not expect to register for the Selective Service draft——

A. Yes.

Q. ——for universal military training?

A. That is right.

Q. What was your reason for not registering?

A. I consider the Selective Service Act an im-

(Testimony of Robert L. Cannon.)

moral act because it is designed to train people in the art of killing other people. Because I claim allegiance to God, as revealed through Jesus Christ, I felt that I couldn't align myself with any part of it, at any step, and that I could not register, [13] and that I owe my higher allegiance to the will and purpose of God, as I understand it so far.

Q. Do I understand you did this after considered thought?      A. Yes.

Q. How long did you contemplate upon this matter before you decided?

A. I thought about it during the time that I was registering for the 1940 Act. The only reason I didn't refuse to register for that Act was because I didn't think I was inwardly prepared to face any of the consequences, and I didn't at that time feel that the Act was wrong.

Q. Was it within the exercise of your religious idealism that you failed to register?

A. Yes; but it was more than that. I exercised my religious idealism and, also, the desire to live by the code of ethics set forth by Jesus as best as possible at this point.

Mr. Randles: Take the witness.

### Cross-Examination

By Mr. Johnson:

Q. Mr. Cannon, how old are you now?

A. 23.

Mr. Johnson: May the record show—it is a small

(Testimony of Robert L. Cannon.)

point but I don't believe "Universal Military Training Act" is the proper designation for the present Act, under the indictment as drawn. [14]

Mr. Randles: You may be correct.

Q. (By Mr. Johnson): You have stated that you didn't at the time of your first registration feel that that particular Act, that is, the one that was in effect in 1943—was it—that you didn't feel that that was wrong. Can you explain why you thought that was not wrong as against the present Act which you say you do think is wrong?

A. It wasn't that I didn't feel the 1940 Act was not wrong. I felt that training for the purposes of killing was wrong. I would have asked for a C. O. classification but I knew I was probably going to be rejected because of this physical disability. I didn't think that the act of registration was of such importance that I should refuse at that point. So I registered.

Q. Why do you feel that it is wrong at this point, the mere act of registering?

A. Well, because I see things differently now. I have had a chance to think and study about it in the light of what I believe to be the will and purpose in life. And so I think that registering at this point is wrong. I do now and, if I were in the same position that I am now, when I was back at the time I was rejected, I wouldn't have registered for that Act, either.

Q. Are you aware of the fact that the Selective

(Testimony of Robert L. Cannon.)

Service Act of 1948 permits exemption from any kind of service at [15] all and, also, for non-combatant service to persons whose religious training and belief conflict with service in the Army?

A. Yes; I am.

Q. What would your position be should this country be invaded by a foreign power within the near future?

A. I don't know. It is hard to say. It is like asking me what would I do if I walked by a water heater and it exploded, that is, as I passed it, what would I do. I imagine I would have the same position, to try to hold to the law and ethics of Jesus as much as possible under the circumstances.

Q. As much as possible under the circumstances? What do you mean by that?

A. Just what I said. I can't tell you what the circumstances are since I don't know what the circumstances would be.

Q. Don't you regard your present position as a rather absolute one?

A. I don't understand you.

Q. Do you not regard your present position of refusing to register as a rather absolute one, which takes no regard of circumstances, whatever they may be?

A. No. I only recognize it as an absolute position in regard to the Selective Service Act of 1948.

Q. Do you understand why the Selective Service Act of [16] 1948 was reportedly enacted?



(Testimony of Robert L. Cannon.)

A. I think I do.

Q. You, then, at this time set yourself up, without regard to the will of the majority of the people, as expressed by Congress, as individually determinative of what your position should be, is that correct?

A. In regard to this specific Act?

Q. Yes.           A. Yes.

Q. But your position is not so absolute that it could not change within a week or so should the country be invaded by a foreign power?

A. Oh, no; I don't think I would change any if Russia came over and started attacking us.

Q. I didn't mean any country.

A. Or any country. I think I would be absolute all the way down the line. I hope I would be.

Q. You are not sure of what your position would be, then?           A. Under what circumstances?

Q. Under any circumstances other than the one now.           A. No; not absolutely sure; no.

Q. In other words, your position as it now is is not entirely a firm one, is it?

A. Oh, yes; it is firm for this instance. [17]

Mr. Johnson: No further questions.

Mr. Randles: That is all, Mr. Cannon.

Mr. Johnson, I have other witnesses here who would simply be corroborative of the defendant's purpose, habits and characteristics. I doubt if they can add anything to the issues here involved. In the

interests of saving time, if you will stipulate that he did not register because of his exercise of his religion, I will rest.

Mr. Johnson: Well, do you say these particular witnesses would give testimony as to his good character?

Mr. Randles: Character, as to his habits, his religious habits.

Mr. Johnson: I am not sure that that would be any particular issue in this case.

Mr. Randles: That is why I am willing—if you will stipulate that he did not register because of his religious convictions, I will not call them.

Mr. Johnson: I think the government is prepared to stipulate that he might not have registered because of his religious convictions.

Mr. Randles: Thank you. That is all.

The Court: Do I understand the stipulation is that the reason why the defendant did not register and has not registered under the Selective Service Act of 1948 was because of his religious beliefs and convictions? [18]

Mr. Randles: Right.

Mr. Johnson: Yes, your Honor.

The Court: Very well. The jury will so understand.

Mr. Randles: Very well; that is all. The defense rests.

The Court: Any rebuttal?

Mr. Johnson: No, your Honor.

\* \* \* \*

The Court: Is it stipulated, gentlemen, that the jury has left the room and the defendant remains present?

Mr. Johnson: So stipulated, your Honor.

Mr. Randles: Yes, sir.

The Court: Normally, at this stage of the case, I would have read the copies of the instructions, prepared by you gentlemen, that I may give the jury, but I haven't had an opportunity to read the requests. There are to be requests by the defendant?

Mr. Randles: Yes, your Honor.

The Court: And I notice in the file some requests for the government. Is the defendant now filing some requests?

Mr. Randles: Yes, sir. I have served a copy on counsel.

The Court: That will be satisfactory. Under Rule 30, I believe it is incumbent upon me to advise you of my intended action upon the requests. I will examine these requests during [19] recess and, upon reconvening, I will discuss the instructions with you. We will take a recess for five minutes.

(Short recess.)

The Court: Is it stipulated that the defendant is present and the jury is absent?

Mr. Johnson: So stipulated, your Honor.

Mr. Randles: So stipulated, your Honor.

The Court: I expect to give the substance of all of the defendant's requested instructions. They

may be modified in some particulars but I will give the substance of all of them, that is, the instructions numbered 1 to 13 inclusive. I propose to give Government's requested instructions, at least the substance of them, A, B, C, D, E, F, G, H, and I.

Mr. Randles: If your Honor please, is it proper at this time to object to some of the government's instructions?

The Court: Yes; I would like to hear any objections although, under a recent decision by the Circuit Court of Appeals, it is necessary to make the objection again after the charge has been given to the jury, and that opportunity will be afforded you outside of the presence of the jury and before they retire. If you wish to make any objection now, you may do so.

Mr. Randles: My objection was, your Honor, to instruction H. I think that is too broad.

The Court: Is it your view that the defendant's religious [20] training and belief is an issue in the case?

Mr. Randles: Yes.

The Court: I take it that it is the defendant's position that the law as applied to him is unconstitutional because it, as applied to him, is an Act which prohibits the free exercise by him of his religious beliefs?

Mr. Randles: That is right.

The Court: And the record may so show, and the trial court intends it to be the defendant's position throughout the case that the statute as applied to

this defendant would amount to an unconstitutional deprivation of his free exercise of religion and, as such, would violate the First Amendment to the Constitution.

Mr. Randles: Yes.

The Court: I believe that will be sufficient to preserve the point throughout the case.

Mr. Randles: I think it is.

The Court: But I think it would be well for you to renew the objection on that ground to any and all instructions you desire to object to, after the charge is given to the jury.

Mr. Randles: Thank you.

Mr. Johnson: "H" will go in, then, your Honor?

The Court: The substance of "H." I am just indicating the instructions I will give. And I, J and K, and I will [21] also give some other instructions.

Mr. Johnson: Your Honor, the government objects to Instruction No. 1 on the part of the defendant, feeling that that again touches upon the constitutional issue and that it will only serve to confuse the issues of this case which, we submit, are the two stated in the argument and in one of the instructions, or the opening statement.

The Court: I expect to instruct the jury that this statute as applied to the defendant is not an unconstitutional deprivation of the free exercise of religion.

Mr. Johnson: That would, of course, remove our objection to No. 1.

The Court: The defendant, I take it, wants an instruction along those lines so the record will be clear that the constitutional question is in the case.

Mr. Randles: Yes, your Honor.

The Court: Are you ready to proceed with the argument now?

Mr. Johnson: Yes, your Honor.

(Opening argument, by Mr. Johnson, to the jury.)

(Argument, by Mr. Randles, to the jury.)

(Closing argument, by Mr. Johnson, to the jury.)

(Whereupon, an adjournment was taken until 9:30 o'clock a.m., Thursday, June 2, 1949.) [22]

Thursday, June 2, 1949, 9:30 A.M.

(The following proceedings took place in the absence of the jury:)

(Case called by clerk.)

Mr. Randles: If your Honor please, I have two additional instructions I would like to present to the court.

The Court: Very well. Will you hand the requested instructions to the clerk?

Mr. Johnson: To both of which the government objects. We have seen them.

The Court: The court will refuse defendant's requested instructions 14 and 15, which have just been filed.

Mr. Randles: If your Honor please, I understand under the Rules of court we should take exception to the refusal of the court to give instructions.

The Court: Yes, but only after the charge has been given, prior to the time the jury retires. After the jury has been instructed, I will afford you an opportunity, by excusing the jury and outside of the presence of the jury, to take exceptions and make objections that you or the other side may wish to take.

Are you ready to have the jury brought in?

Mr. Randles: Yes, sir.

Mr. Johnson: Yes, sir, your Honor. [23]

The Court: Is it stipulated, gentlemen, that the jury and the defendant are present?

Mr. Johnson: So stipulated, your Honor.

Mr. Randles: So stipulated.

## INSTRUCTIONS TO THE JURY

The Court: Members of the jury, you have heard the evidence and the argument. Now it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to

what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider [24] all the evidence, follow the law as stated by the court and reach a just verdict, regardless of the consequences. [25]

\* \* \*

Section 453 of Title 50 of the United States Code provides in part that:

“ . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.”

Proclamation No. 2799, issued July 20, 1948, by the President of the United States, provides in part that:



1. The registration of male citizens of the United States and other male persons residing in the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth [34] anniversary of the day of their birth shall take place . . . between the hours of 8:00 a.m. and 5:00 p.m. on the day or days hereinafter designated for their registration, as follows: \* \* \*

(e) Persons born in the year 1926 shall be registered on Wednesday, the 8th day of September, 1948, or on Thursday, the 9th day of September, 1948.

\* \* \*

2. (a) Every male citizen of the United States . . . who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

\* \* \*

3. Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith." [35]

Section 462(a) of Title 50 of the United States Code provides in part that:

“Any . . . person charged . . . with the duty of carrying out any of the provisions of . . . (the Selective Service Act of 1948), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses registration . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this (Act), or rules, regulations or directions made pursuant to this Act . . .” shall be guilty of an offense.

The Selective Service Act of 1948 was passed by the Congress of the United States pursuant to authority granted by the Federal Constitution to provide for our national defense.

You are not to be concerned with the wisdom or desirability of the Selective Service Act of 1948. It is the law of the land and, as jurors, you must be governed by it and apply it in arriving at an impartial verdict in this case.

Persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any [36] form, including duly ordained ministers of religion and students preparing for the ministry, are not exempted from registration under the Selective Service Act of 1948.

Once they are registered, however, such persons may be exempted from training and service under

the Act. In this connection Section 456(j) of Title 50 of the United States Code provides in part that: "Nothing contained in (the Selective Service Act of 1948) . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

But in order to avail themselves of such exemption from training and service, the law provides that conscientious objectors must first register as required by the Act.

Thus, there are two essential elements of the offense charged in the indictment:

First: Whether the defendant was, at the time and place alleged in the indictment, a male person within the class required to register for selective service under the Selective Service Act of 1948; and

Second: Whether the defendant knowingly failed and neglected to register as required by said Act and the regulations promulgated thereunder. [37]

As stated before, the burden is upon the prosecution to prove beyond all reasonable doubt every essential element of the crime charged.

You will note that the omission or failure to act charged in the indictment is alleged to have been "knowingly" done.

The purpose of adding the word "knowingly" to the statute was to insure that no one would be

convicted because of mistake or inadvertence or other innocent reason.

(Instruction 14-A)

The First Amendment to the Federal Constitution declares that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The defendant's religious beliefs are within the protection of the First Amendment, but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs. The United States has the constitutional power to require the registration of all male citizens between the ages of eighteen and twenty-six, as the [38] Selective Service Act of 1948 provides, and the exercise of such power in accordance with the Act does not constitute an abridgement of the freedom of religion of any person.

(Instruction 14-B.)

In the words of the late Mr. Justice Cardozo of the United States Supreme Court:

“Never in our history has the notion been accepted. . . . that acts . . . indirectly related to service in the camp or field are so tied to the

practice of religion as to be exempt, in law or in morals, from regulation by the state. . . .

“Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.” [39]

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge’s opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the court to admonish an attorney who, out of zeal for his cause, does some-

thing which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the court may have been addressed during the trial of this case.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the [40] accused.

The defendant is not on trial for any act or conduct not alleged in the indictment.

The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their

deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may [41] become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction.

If the accused be proved guilty, say so. If not proved guilty, say so. Remember at all times that a defendant is entitled to acquittal if any reasonable doubt remains in your minds.

Remember also that the question before you can never be: will the government win or lose the case? The government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

If it becomes necessary during your deliberations to communicate with the court, you may send a note

by the bailiff. But bear in mind you are not to reveal to the court or any [42] person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict.

Before I complete the instructions, we will take a brief recess.

(Recess.) [43]

(The jury thereupon retired.)

The Court: Is it stipulated, gentlemen, that the jury has left the room and the defendant remains present?

Mr. Johnson: So stipulated.

Mr. Randles: Yes, your Honor.

The Court: Have counsel for the government any objections to the instructions given?

Mr. Johnson: No, your Honor; no objections.

The Court: Have counsel for the defendant any objections or exceptions?

Mr. Randles: If the court please, we would like to take exception to Instruction 14-A and Instruction 14-B.

The Court: On the ground, as I understand it, that the defendant does contend that the requirements of registration under the Selective Service Act of 1948, as applied to him, do unconstitutionally infringe his right under the First Amendment to the Constitution, in the free exercise of his religion?

Mr. Randles: Yes, sir. And to Instruction 14-B



on the further grounds that the instruction is not an instruction as to the law of the case but, rather, an argument in upholding the government's indictment against the defendant.

The Court: Anything further?

Mr. Randles: No, your Honor. Well, by the way, yes. I would like to take an exception to the court's disallowing or refusing to give Instructions 14 and 15 as presented by [44] counsel for the defendant. I presume this is the correct way to do that.

The Court: Yes. As to the refusal of the court to give any requested instruction, you must specify reasons at this time if you desire to preserve an exception.

Mr. Randles: In other words, I will state at this time my reason for the exception?

The Court: For your exception to any omission as well as anything that may have been included in the charge.

Mr. Randles: Yes, sir. My reason for the exception is that it was an instruction embodying and having to do with certain stipulations which had been entered into by government's counsel and counsel for the defendant, and should be considered by the jury as taken without the issues of the case insofar as the stipulations go.

The Court: To the instructions refused, I take it you except on the ground that the refusal to give them is error because by the instructions themselves the jury has been told that the defendant's

refusal to register based upon his religious beliefs was not justified, because the requirement of the law, as applied to the defendant, constitutes an unconstitutional infringement upon the free exercise of his religion as set forth in the First Amendment?

Mr. Randles: Yes, your Honor.

The Court: I would not have given the instruction in the [45] language that Mr. Justice Cardozo did had it not been for the manner in which the case was argued to the jury. Sometimes it is desirable to state the law and to state the reason of the court in order to aid the understanding of the jury.

Are there any other objections?

Mr. Randles: No, your Honor.

The Court: Is it stipulated that the final instruction, No. 20, may be given without affording an opportunity for further objection? That is the instruction as to the verdict.

Mr. Randles: Yes, your Honor; so stipulated.

Mr. Johnson: So stipulated.

The Court: You have copies of it before you, have you not?

Mr. Randles: Yes, your Honor.

The Court: Are you ready to have the jury returned?

Mr. Johnson: Yes, your Honor.

Mr. Randles: Yes, your Honor.

The Court: Will you stipulate that the jury and the defendant are present?

Mr. Randles: So stipulated.

Mr. Johnson: So stipulated.

The Court: I will now conclude the instructions, ladies and gentlemen.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over [46] your deliberations and be your spokesman in court.

A form of verdict has been prepared for your convenience.

“In the United States District Court, in and for the Southern District of California, Central Division.

“United States of America, plaintiff, v. Robert L. Cannon, defendant. No. 20507 Criminal.

“Verdict.

“We, the jury in the above-entitled cause, find the defendant, Robert L. Cannon, ..... as charged in the indictment.

“Los Angeles, California, June . . . ., 1949.

“....., Foreman of the Jury.”

You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form to state the verdict upon which you agree, and then return with your verdict to the court room.

Mr. Clerk, will you swear the bailiffs?

(Bailiffs sworn.)

The Court: Ladies and gentlemen, you will be in custody of the bailiffs who have just been sworn.

The exhibits which have been received in evidence—were there any exhibits?

The Clerk: Yes, your Honor; four.

The Court: Yes; I recall that. All exhibits which have been received in evidence and the instructions of the court and the copy of the indictment will be made available to you [47] if you request them. You will now retire to the jury room to deliberate upon your verdict. [47-a]

(The following instructions were requested by counsel for the defendant and refused by the court:)

(No. 14)

You are instructed that when a matter has been stipulated to by counsel representing the government and the defendant, it is no longer an issue in this case. In that connection, I would instruct that it has been stipulated to: First, that the defendant did not register under the Selective Service Act of 1948, and it has been further stipulated that his non-registration was because of his exercise of his religious convictions.

(No. 15)

The court further instructs you that because of the First Amendment of the Constitution of the United States, which, as heretofore you have been instructed, reads in part as follows:

“Congress shall make no law respecting an es-

tablishment of religion, or prohibiting the free exercise thereof,"

and it having been stipulated that this defendant's failure to register was due to the exercise of his religious motives, you are instructed that so far as this defendant is concerned, the Selective Service Act of 1948 is unconstitutional and you should bring in a verdict of not guilty. [48]

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of July, A.D., 1949.

/s/ ROSS REYNOLDS,  
Official Reporter.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 51, inclusive, contain the original Indictment; Defendant's Requested Instructions Nos. 14 and 15; Court's Instructions to the Jury; Verdict; Judgment and Commitment; Notice of Appeal; Stipulation re Record on Appeal and two Stipulations and Orders Extending Time to Docket Appeal and full, true and correct copy of minute order entered February 7, 1949 which, together with the original reporter's transcript of proceedings on June 1 and 2, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 6th day of October, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 12374. United States Court of Appeals for the Ninth Circuit. Robert L. Cannon, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 7, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

ROBERT L. CANNON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

### POINTS RELIED UPON IN APPEAL

Pursuant to rules of the above-entitled Court, appellant hereby presents his points to be relied upon in the above pending appeal:

#### A.

The Selective Service Act of 1948 as applied to this appellant is unconstitutional.

#### B.

Under the stipulation entered into between the appellant and counsel for appellee during the proceedings in the District Court, R.T., page 18, the Trial Court erred in refusing to give certain instructions requested by appellant, to-wit: Instruction No. 14 and Instruction No. 15, as set forth on page 48 of the Reporter's Transcript, and to which exception was duly taken as set forth on page 45 of the Reporter's Transcript.

#### C.

The Court erred in giving certain instructions which were given by the Court over the objection and exception by *by* counsel for appellant, said



instructions specifically being 14-a and 14-b, as set forth in Reporter's Transcript, at pages 38 and 39.

Respectfully submitted,

/s/ JAS. D. RANDLES,  
Attorney for Appellant.

[Endorsed]: Filed Oct. 10, 1949.

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[Title of Court of Appeals and Cause.]

NOTICE OF DESIGNATION OF PORTION  
OF TRANSCRIPT TO BE PRINTED

To Paul P. O'Brien, Clerk of the above-entitled Court, and to Norman W. Neukom and Sander L. Johnson, attorneys for Appellee in the above-entitled matter:

You will please take notice that the Appellant in the above-entitled matter hereby designates the following portions of the reporter's transcript, in that certain proceedings entitled the United States of America vs. Robert L. Cannon, number 20507, Criminal, in the United States District Court, Southern District of California, Central Division, as being necessary for the review of said matter in the Court of Appeals, Reporter's Transcript from page 1 to page 24 through line 22 inclusive and from page 34, line 5 to end of Reporter's Transcript of proceedings; also Clerk's Transcript.

Respectfully submitted,

/s/ JAS. D. RANDLES,  
Attorney for Appellant.

[Endorsed]: Filed Oct. 10, 1949.



No. 12374.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

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JAMES D. RANDLES,

818 Transamerica Building, Los Angeles 14,

*Attorney for Appellant.*

FILED

DEC 27 1948

PAUL P. O'BRIEN



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No. 12374.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### Statement of Pleadings and Facts.

This is an appeal from a judgment of conviction of the appellant, Robert L. Cannon, on an indictment charging violation of the Selective Service Act of 1948 for failure to register thereunder.

The trial was by jury that found appellant guilty and as a result the Court sentenced him to three years imprisonment.

This Court has jurisdiction under the provisions of 28 U. S. C. 1281 and 1294(1), 18 U. S. C. 3732 and Rule 37-A, Rules of Criminal Procedure for the District Courts of the United States.

The records of the proceedings have been printed, pursuant to Rule 19 of this Court.

### **The Statute Involved.**

The Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. Appx. 98, 11 F. C. A. Title 50, Appx. 97) calling for the conscription of an army is involved. The specific section concerned, Section 3, provides:

“Except as otherwise provided in this title (this appendix), it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and places or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.”

### **Statement of the Case.**

#### **FACTS.**

Appellant was born January 19, 1926, in Oakland, California [Tr. p. 38].

He refused to register under the Selective Service Act of 1948, and, on September 5, 1948, wrote his Draft Board, located at 1206 South Santee Street, Los Angeles, giving them his address and stating, in part, as follows:

“This is to notify you that I am refusing to register for the draft. My conscience, nurtured in the Christian doctrine of love, non-violence, and forgiveness will not permit me to align myself with the Selective Service system, which I consider unjust and un-Christian.

Signed, “Robert L. Cannon, Age, 22 years.”

[Tr. p. 40.]



Again, on September 27, 1948, he wrote a letter to Walter H. Henderson, Director of Selective Service, 1209 Eighth Street, Sacramento 14, California, which read in part as follows:

“Thank you for your letter and the advice rendered. I have no intention, however, of altering my position, *i. e.*, of refusing to register for the draft. I am quite aware of the possible consequences of my action. But as a Christian who believes it mandatory to put into daily practice the teachings of Jesus, I agree with Paul, who says we ought to obey God rather than man.

“Thank you again.

“in His Service,

“Signed Robert L. Cannon.”

[Tr. p. 44.]

Again, on January 5, 1949, appellant made a statement to Henry C. Johnson and Joseph B. Backus, Special Agents of the Federal Bureau of Investigation, wherein he stated in part as follows:

“I feel that the Selective Service Act of 1948 is unjust and un-Christian and for that reason I refuse to register, although I realize that I am one of the persons whom the law requires to register.” [Tr. p. 43.]

After the prosecution rested its case, appellant took the stand and testified in effect that he did not register because:

“I consider the Selective Service Act an immoral act because it is designed to train people in the art of killing other people. Because I claim allegiance to God, as revealed through Jesus Christ, I felt that I couldn't align myself with any part of it, at any

step, and that I could not register, and that I owe my higher allegiance to the will and purpose of God, as I understand it so far.” [Tr. p. 46.]

After appellant was cross-examined by the United States Attorney, the following stipulation was entered into in the following manner :

“Mr. Randles: That is all, Mr. Cannon. Mr. Johnson, I have other witnesses here who would simply be corroborative of the defendant’s purpose, habits and characteristics. I doubt if they can add anything to the issues here involved. In the interests of saving time, if you will stipulate that he did not register because of his exercise of his religion, I will rest.

Mr. Johnson: Well, do you say these particular witnesses would give testimony as to his good character?

Mr. Randles: Character, as to his habits, his religious habits.

Mr. Johnson: I am not sure that that would be any particular issue in this case.

Mr. Randles: That is why I am willing—if you will stipulate that he did not register because of his religious convictions, I will not call them.

Mr. Johnson: I think the government is prepared to stipulate that he might not have registered because of his religious convictions.

Mr. Randles: Thank you. That is all.

The Court: Do I understand the stipulation is that the reason why the defendant did not register and has not registered under the Selective Service Act of 1948 was because of his religious beliefs and convictions?

Mr. Randles: Right.

Mr. Johnson: Yes, your Honor.

The Court: Very well. The jury will so understand.” [Tr. pp. 49 and 50.]

## Facts as to the Instructions.

At the conclusion of taking of evidence and a short recess, the following took place:

“Mr. Randles: My objection was, your Honor, to instruction H. I think that is too broad.

The Court: It is your view that the defendant’s religious training and belief is an issue in the case?

Mr. Randles: Yes.

The Court: I take it that it is the defendant’s position that the law as applied to him is unconstitutional because it, as applied to him, is an Act which prohibits the free exercise by him of his religious beliefs?

Mr. Randles: That is right.

The Court: And the record may so show, and the trial court intends it to be the defendant’s position throughout the case that the statute as applied to this defendant would amount to an unconstitutional deprivation of his free exercise of religion and, as such, would violate the First Amendment to the Constitution.

Mr. Randles: Yes.

The Court: I believe that it will be sufficient to preserve the point throughout the case.” [Tr. pp. 51 to 53.]

\* \* \* \* \*

“The Court: I expect to instruct the jury that this statute as applied to the defendant is not an unconstitutional deprivation of the free exercise of religion.

Mr. Johnson: That would, of course, remove our objection to No. 1.

The Court: The defendant, I take it, wants an instruction along those lines so the record will be clear that the constitutional question is in the case.

Mr. Randles: Yes, your Honor.

The Court: Are you ready to proceed with the argument now?

Mr. Johnson: Yes, your Honor.” [Tr. pp. 53 and 54.]

Among other instructions, the Court gave instruction 14-A, set forth in full as follows:

“The First Amendment to the Federal Constitution declares that:

‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

“The defendant’s religious beliefs are within the protection of the First Amendment, but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs. The United States has the constitutional power to require the registration of all male citizens between the ages of eighteen and twenty-six, as the Selective Service Act of 1948 provides, and the exercise of such power in accordance with the Act does not constitute an abridgement of the freedom of religion of any person.” [Tr. p. 60.]

and 14-B a portion of which is as follows:

“In the words of the late Mr. Justice Cardozo of the United States Supreme Court:

‘Never in our history has the notion been accepted . . . that acts . . . indirectly related to service in the camp or field are so tied to practice of religion as to be exempt, in law or in morals, from regulation by the state . . .

‘Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.’ ” [Tr. pp. 60 and 61.]

### Issues.

1. Did the Court err when he instructed the jury as set forth above in instruction 14-A and particularly as follows:

“ . . . but the mere requirement of registration under the Selective Service Act of 1948 does not unconstitutionally infringe the free exercise by the defendant of his religious beliefs.”

2. Did the Court err when he refused to give the proffered instructions, by appellant, No. 15, and which is as follows:

“The Court further instructs you that because of the First Amendment of the Constitution of the

United States, which, as heretofore you have been instructed, reads in part as follows:

‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’

and it having been stipulated that this defendant’s failure to register was due to the exercise of his religious motives, you are instructed that so far as this defendant is concerned, the Selective Service Act of 1948 is unconstitutional and you should bring in a verdict of not guilty.”

3. Did the Court err when he refused to give appellant’s proffered instruction No. 14, reading in part as follows:

“You are instructed that when a matter has been stipulated to by counsel representing the Government and the defendant, it is no longer an issue in this case. In that connection, I would instruct that it has been stipulated to: First, that the defendant did not register under the Selective Service Act of 1948, and it has been further stipulated that his non-registration was because of his exercise of his religious convictions.”

We believe these are the issues.

### **Law of the Case.**

The First Amendment of the Constitution of the United States, Article I, provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

### Argument.

With millions of our school children daily standing and orally pledging allegiance to the flag which is the emblem of the Constitution;

With thousands of Courts being opened daily with Judges, Court officers and litigants standing reverently while the bailiff vocally pays homage to the flag, the emblem of the Constitution;

With hundreds of prospective lawyers and Judges daily raising their right hands and taking a solemn oath to support and defend the Constitution;

With the law requiring that even a prospective Executor or Administrator, charged with no greater duty than to close the business affairs of a dead man, must solemnly swear to support the Constitution of the United States—and they all refer to the same Constitution;

It would seem like carrying the proverbial coals to Newcastle to admonish this Court that the Constitution should not be ignored or, putting it the other way, its provisions should be enforced.

We have read and re-read, with growing respect for the ability of the distinguished lawyers who prepared it, the brief filed in the case of *Richter v. The United States*, filed in this Court and bearing number 12282, and assume this Court is thoroughly familiar with the arguments and authorities therein set forth. Possibly, the only material difference in the case at bar and the one above referred to is the fact that in the case at bar we believe all the material facts are covered by stipulation made in open Court and under the intelligent guidance of the trial judge,

who, judicially, sensed the real issue and made it clear and easy to present to this Court.

At this point, may we stop and pay tribute to the thoughtful attention and judicial eagerness to be fair and kind that was displayed by the trial court. The only cruel thing appearing in the record is the sentence of three years he pronounced on the appellant, who was for the first time in his life found guilty of any crime—a student in one of our universities, preparing to be a minister of religion and one of whom the trial said, at the time of sentence: “He is not a criminal at all.” (This statement does not appear in the transcript for it came up just preceding the sentence and on the hearing for defendant’s plea for probation which was denied.)

We think the fundamental issue is well expressed in the opinion in the *Barnett* case (*Board of Education v. Barnett*, 319 U. S. 624), at page 638:

“The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One’s right to life, liberty . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections,”

and, following that principle, it is necessary for the Court to presume legislation unconstitutional whenever it encroaches on these basic rights.



One of the basic reasons for this is that in our democratic process minorities find little protection because of political impotence unless there is protection by the Courts from oppressive operation of the majority will.

(Sources and Limits of Religious Freedom—Summers, 41 Illinois Law Review 53).

Page 67:

“It is necessary for the court to presume legislation unconstitutional not only when it is discriminatory on its face (*Korematsu v. U. S.*, 323 U. S. 214, 216) and when it may appear to the court that the primary motive was to discriminate against a particular minority (Example: Statutes aimed at parochial schools, *Pierce v. Society of Sisters*, 262 U. S. 390) but also where legislation is apparently enacted in good faith but necessarily results in oppression of a minority because the group does not conduct itself in the customary manner. A school flag salute rule may have been well intended but it was a violation of a group’s religious beliefs because it represented to them the bowing before a graven image.

“(Barnett case.) Requiring a peddler’s license would seem proper on its face but it was declared invalid because of placing a discriminatory burden on the religious practices of Jehovah Witnesses.” (*Murdock v. Pennsylvania*, 319 U. S. 105, 109.)

Here the legislation involved was made the law of the land by a majority of those in power, but as to this defendant the operation of it became an unconstitutional limitation upon his basic right to the exercise of his religion.

When the Court has found it necessary to limit the fundamental freedoms of the Bill of Rights, it has used what has been referred to as the clear and present danger doctrine. This doctrine has been applied not only to the freedom of speech and press cases, but also in the freedom of religion cases. It is expressed in

*Bridges v. California*, 314 U. S. 252.

“What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished . . . for the First Amendment does not speak equivocally.”

The Court has used this doctrine in declaring laws unconstitutional which would be apparently valid, such as limiting the distribution of handbills in order to keep the streets clean (*Cantwell v. Connecticut*, 310 U. S. 296), the requirement that children should salute the flag when attending school (*Barnett* case, already cited).

This is true even though in the case at bar the defendant's beliefs lead him to actions that are peculiar as judged by majority standards. (Dissent—*Jones v. City of Opelika*, 316 U. S. 584):

“Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be.”

In the case at bar, then, whose rights would be impinged upon, or where is there any clear and present danger rule to be considered which would justify the denial of this appellant his constitutional rights?

If it be claimed the military must know for statistical purposes who the young men are and where they are they might be available, that end has been supplied by the defendant, who, voluntarily, gave to his Draft Board his name, age and residence and the further information that his conscience would not permit him to register. Who, then was injured?

The foregoing makes it manifest that appellant did not try to *evade* the law.

It will be remembered that he was charged with having failed to register, but, under the regulations, the duty was on the Draft Board to so do when they were apprized of appellant's position.

We quote regulation 613.13 (13 Fed. Reg. 4536) as follows:

“‘*Regulation 613.13*: If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word ‘Registrar’ beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed his Registration Card (SSS Form No. 1), *and such registrant shall thereby be registered.*” (Italics added.)

As was urged in the *Richter* brief:

“Appellant was entitled to rely on this regulation. Since, upon his refusal to sign the registration card, it became the duty of the registrar to sign for him and thereupon he ‘shall thereby be registered,’ it is

not proper under the doctrine of *Connally v. General Construction Co.*, 269 U. S. 385, 391 and *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, to hold appellant criminally liable.

“After all, what is desired under the Act is the *registration* of potential draftees, not the prosecution of them.

“The point is emphasized by a consideration of Regulation 642.31:

“‘*Regulation 642.31* (15 Fed. Reg. 5484(a)): Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every man who has registered or who is required to register under the provisions of Title I of Selective Service Act of 1948 (50 App. 98) *immediately upon his reporting to or being brought before a local board or immediately upon his being taken into custody or his being placed in confinement:*

“‘(1) He shall be registered. (Here follow various specific directives, including):

‘(5) (b) If such man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board . . . from information gained by interviewing the delinquent and from other sources.

‘(c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board . . . shall sign such man’s name and indicate that he has done so by signing his own name beneath the name of such man.’

“It is therefore respectfully submitted that, the above regulations, considered together with Regulation 613.11, demonstrate that appellant need have done no more under the Act and he could be guilty of no crime since it was the duty of the Board to register him upon his notifying them of his position.

“Regulation 613.11 provides:

‘(a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) *must* be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card, except when the registrant signs the completed card.’

“If, despite these regulations, appellant was required to do more, the statute (Section 12(a) of the Act) and the regulations are void for vagueness.”

We cannot review the foregoing authorities without being conscious that the case here presents a problem that does become perplexing to judges and lawyers alike. However, may we most earnestly contend that the stipulation, together with the First Amendment of the Constitution, leads to no logical conclusion but that the appellant was illegally convicted.

To those who point with alarm to the following facts:

(a) We are the richest nation in the world;

(b) Hungry and selfish and unreligious nations covet our wheatfields, oil wells, sky-scrapers, good roads and automobiles, recognizing the constitutional right of this appellant might cause other young men to claim their con-

stitutional heritage. This might undermine our military might and result in our falling prey to some aggressor nation.

To the above, we would ask how would we become in 160 years so strong and so rich that we have become the envy of other nations? The answer we assume would be because we have, under our Constitution, had such a good Government. And the next question might follow: After having gained so much under our Constitution, should we now through fear of losing our inheritance, ignore it or any of its provisions? As we see it, the only logical or legal answer is no.

If the simple language of the First Amendment is dangerous or vicious to our future, ought we not to amend it or revoke it? But let's not have us daily professing our holy regard to it and then when its provisions are raised, ignore it.

Finally, the Constitution framers did not *define religion*. They did *protect it*. This was no vain act or thoughtless gesture, for before they got through they provided for a trial by *jury* and left it in the lap of a jury to say what was and what was not religion.

In refusing to define religion, the framers, no doubt, thought that time might change people's concepts of religion.

The time might come when a man might kill, steal, lie or break any, or all, of the ten Mosaic commandments and might even use modern science to make an atomic bomb and kill 100,000 men, women and children at one time and when his act was questioned *claim* he was exercising his guaranteed constitutional religious liberty;

They might even have looked forth to a time when a man might *refuse* to kill his fellowmen at the order of a third person and when questioned, set up his constitutional guaranteed religious rights;

Or they might even have looked forward to a time when a man would refuse to sign a draft card because he knew it was a part of a war program, which the free exercise of his religion would prohibit him from doing.

In each of the foregoing cases, the constitutional fathers must have thought it was wise to leave the definition of religion in the hands of a jury who would be sensitive to the fact of what religion meant or was in the day in which they live.

After 160 years have passed, is an individual Judge to question their wisdom or substitute his own ideas of what they should have done, or instruct a jury that the defendant's religious rights have not been infringed upon? If so, we pass the responsibility of letting such a judgment stand on to this Court.

Respectfully submitted,

JAMES D. RANDLES,

*Attorney for Appellant.*





No. 12374.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLEE'S BRIEF.

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FILED

JAN 18 1950

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No. 12374.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Jurisdictional Statement.

The appellant was indicted for failure to register under the provisions of the Selective Training and Service Act of 1948(62 Stat. 604, 50 U. S. C. App. 98). The indictment was filed January 19, 1949 [T. 2]. The District Court had jurisdiction of the cause under Title 18, Section 3231, effective September 1, 1948, which confers on the District Court original jurisdiction of all offenses against the United States.

The offense charged was committed in the County of Los Angeles, State of California [T. 2]. On the 7th day of February, 1949, the appellant appeared before the District Court for the Central Division of the Southern District of California for arraignment and plea and en-

tered a plea of not guilty [T. 3]. Thereafter the cause was tried by jury [T. 3, 27]. The appellant was found guilty of the offense charged in the indictment [T. 27, 28] and on June 9, 1949, was sentenced [T. 28, 29]. A Notice of Appeal was filed on June 10, 1949 [T. 29, 30] and the appeal perfected thereafter [T. 70, 71].

### Question Involved.

Does enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment?



## ARGUMENT.

Appellant's brief, beginning at page 7, states that there are three issues in this case. It is submitted that the first two merely reflect, and are subsidiary to, the basic issue as above stated, *i.e.*, whether enforced compliance of the registration provisions of the Selective Training and Service Act of 1948 violates freedom of religion as guaranteed by the First Amendment.

Concerning the third point claimed in appellant's brief to be an issue herein, it will appear from the instructions and rulings of the Trial Court [T. 58-60], and the position of appellee as outlined below, that appellant's religious beliefs, insofar as they caused his refusal to register, are in fact not in issue in this case. Had the Trial Court given appellant's instruction No. 14, as requested [T. 68], its position would have become inconsistent. Hence appellant's point three likewise is but a particularization of the basic issue herein involved.

This Court is no doubt aware that the case at hand represents a constitutional matter of first impression, in its being based upon the Selective Training and Service Act of 1948, and also that it is one which has not received the consideration of courts in other circuits or of the Supreme Court. Attention is invited to the case of *Richter v. United States*, No. 12282, this Court, which has been mentioned, and briefs in connection therewith quoted, in appellant's brief (pp. 9, 13-15), and which is presently before this Court for consideration. It will be noted that the issue herein involved is included in the *Richter* case, *inter alia*.

Appellant, at pages 10 and 11 of his brief, claims a presumption that legislation effecting rights under the

First Amendment is unconstitutional "whenever it encroaches on these basic rights." Whether it does so encroach is, of course, the issue in this case. In any event the rule in this regard has been accurately stated, it is submitted, in the case of *Hall v. Union Light, Heat & Power Company*, 53 Fed. Supp. 817 (1944), at pages 818, 819, where the Court stated:

"It must be borne in mind that while the country was not at war the time this statute was enacted its purpose was for the general welfare and preparation for any eventuality. No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction. The general rule that legislators, as well as judges, must obey and support the constitution and have weighed the constitutional validity of every act they pass, giving to each statute the presumption of constitutionality, is of itself sufficient reason to sustain the validity of the act in question. I strongly adhere to the rule that every reasonable doubt must be resolved in favor of a statute and not against it and that *it should not be adjudged invalid unless its violation of the constitution is clear, complete, and unmistakable.*" (Italics supplied.)

This rule was asserted in the recent case of *National Maritime Union v. Herzog*, 78 Fed. Supp. 146 (1948), aff'd 334 U. S. 854, where there admittedly was involved a *limitation* upon rights granted under the First Amendment. There the Court examined the holding of *Board of Education v. Barnette*, 319 U. S. 624, and other precedents in this connection, and concluded that the presumption of constitutionality must be observed by it, and

that when Congress has found facts to justify the restraint on the particular individual freedom, the presumption “continues in full vigor” (p. 174).

There can be no dispute with the statements of the Supreme Court in the *Barnette* case as cited on page 10 of the appellant’s brief, concerning the purpose of the Bill of Rights. But it is as well established that the rights of an individual under the First Amendment are neither absolute nor limitless. *Baxley v. United States*, 134 F. 2d 937 (C. A. 4, 1943). There Circuit Court Judge Parker, who wrote the opinion of the lower court in the *Barnette* case (*Barnette v. West Virginia Board of Education*, 47 Fed. Supp. 251, 253), is quoted to the following effect:

“This does not mean, of course, that what a man may do or refrain from doing in the name of religious liberty is without limitations. He must render to Caesar the things that are Caesar’s as well as to God the things that are God’s. He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community.”

The Court in the *Baxley* case then went on to say:

“Even clearer is it that one is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty. *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Gilbert v. State of Minnesota*, 254 U. S.

325, 41 S. Ct. 125, 65 L. Ed. 287; *United States v. Macintosh*, 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; *City of Manchester v. Leiby*, 1 Cir., 117 F. 2d 661; *Rase v. United States*, 6 Cir., 129 F. 2d 204.”

That the depth and sincerity of one’s religious belief will not excuse his violation of a valid criminal statute was likewise emphasized in the leading case of *Davis v. Beason*, 133 U. S. 333, 342 (1889).

### **Enforced Compliance With the Registration Provisions of the Selective Training and Service Act of 1948 Does Not Violate Appellant’s Freedom of Religion Under the First Amendment.**

It is clear that Congress has the power to raise a peacetime army by conscription. *United States v. Herling*, 120 F. 2d 236 (C. A. 2, 1941), and authorities cited therein; *United States v. Cornell*, 36 Fed. Supp. 81. That it has the concomitant constitutional power to request registration of male citizens during peacetime, as under the Selective Training and Service Act of 1948, is equally clear; and the authorities abundantly show that the exercise of such power does not constitute an abridgement of the freedom of religion of any person. In *Local Draft Board No. 1 v. Connors*, 124 F. 2d 388 (C. A. 9, 1941), the Court held:

“It is within the congressional power to call everyone to the colors. No one under the jurisdiction of the sovereign nation, whatever his or her status, is exempt except by the grace of the government.”

Since it is within the power of Congress to call everyone to the colors without exemption, there is no basis in reason or policy for this Court to hold that Congress does

not have the power to require that its male citizens merely register without exemption under the Selective Training and Service Act of 1948. In *United States v. Rappeport*, 36 Fed. Supp. 915, the Court held:

“Accordingly Congress undoubtedly has the power to seek information through registration or otherwise in peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription \* \* \*

See, also, *Stone v. Christensen*, 36 Fed. Supp. 739 (1940), at 743, where the provisions of the Selective Training and Service Act of 1940, for peacetime registration, were held to be constitutional. The Court stated succinctly:

“In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words ‘at peace’ cannot be permitted to tyrannize in making judgments. \* \* \* but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, *a failure to register manpower of the country would be a failure to provide for ‘the common defense.’*” (Italics supplied.)

In *United States v. Lambert*, *supra*, 123 F. 2d 395 (C. A. 3, 1941), the Court held that the power of Congress to compel registration for military service and training is not limited to actions taken after a formal declaration of war.

In *United States v. Brooks*, 54 Fed. Supp. 995 (1944), at page 996, the Court made the following comment:

“Respect for the integrity of conscience is unquestionably firmly embedded in our constitutional foundations. Reason finds it difficult to comprehend the appeal for the shelter of the Constitution by one who is unwilling to defend the Constitution. Logic looks askance at one who, asserting his right to freedom of religion, refuses to have any share in resisting an enemy who has declared war upon us and whose first act in every land he had invaded has been to abolish freedom of religion.”

The Court went on to quote from *West Virginia Board of Education v. Barnette*, *supra*, 319 U. S. 624, as follows:

“No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are \* \* \* imperatively necessary to protect society as a whole from grave and pressing imminent dangers. \* \* \*”

At this point it is worthwhile to set out again the words of the late Mr. Justice Cardozo in the case of *Hamilton v. Regents*, 293 U. S. 245, at pages 267-268, as quoted by the Trial Court in its instruction No. 14-A [T. 60, 61]:

“Never in our history has the notion been accepted, or even, it is believed, advanced, that acts \* \* \* indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. \* \* \*

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as immoral. The right of private judgment has never yet been exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.”

See, also:

*In re Summers*, 325 U. S. 561, 571 (1945);

*United States v. Moriarity*, 106 Fed. 886, 891-892 (Cir. Ct., N. Y., 1901).

In *Hopper v. United States*, 142 F. 2d 181 (C. A. 9, 1943), the Court commented:

“A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases (*Arver v. United States*), 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856.”

In *Bronemann v. United States*, 138 F. 2d 333 (C. A. 8, 1943), it was held:

“For the whole class of persons the procedure set up by the Act provides to the individual the full protection of due process of law throughout the proceedings by which his general liability to military service becomes a fixed obligation through his selection and induction into such service.”

Further, in *Rase v. United States*, 129 F. 2d 204 (C. A. 6, 1942), the Court stated:

“The Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy calling.”

In *United States v. Newman*, 44 Fed. Supp. 817 (1942), it was again held:

“The grant of exemption to conscientious objectors is not a matter of constitutional right but wholly an act of grace upon the part of Congress.”

Appellant in his brief (p. 12) explicitly raises for the first time the claim that there is no “clear and present danger” warranting denial of his constitutional rights, in the sense of requiring one of his religious beliefs to register for conscription. Apparently appellant misapprehends the nature of the power on which the raising of an army by conscription is based. Clearly the doctrine of “clear and present danger” has no bearing upon the assertion of a power explicitly granted, in the Constitution, to Congress. “It may be taken as settled that the power of Congress to raise and support armies conferred in Article



I, Section 8, of the Constitution may be implemented by legislation providing for compulsory service." *United States v. Lambert, supra*, 123 F. 2d 395, which as above indicated also upheld as constitutional the concomitant power to require registration. The cases above cited as dealing with constitutionality of conscription acts and registration provisions thereunder clearly base their holding upon the explicit grant to Congress, in Article I, Section 8 of the Constitution, of the power to raise armies, and to "provide for the common defense" as contained in the Preamble of the Constitution.

This is also made amply clear in the cases of *United States v. Schwimmer*, 279 U. S. 644 (1929), and *United States v. McIntosh*, 283 U. S. 605 (1931), wherein it is emphasized by the court that Congress does have the constitutional power to exact military duty from all alike, and that only by virtue of tradition and liberal attitude have those whose religious convictions forbid performing military service been excused. The cases of *Stone v. Christensen, supra*, 36 Fed. Supp. 739, and *United States v. Rappeport, supra*, 36 F. 2d 915, again clarify this point in regard to the Selective Training and Service Act of 1940.

It appears then that the criterion is not one of "clear and present danger" but rather, one of "need". The former doctrine, as substantiated by the cases cited in appellant's brief (pp. 11, 12), is one concerned with dealing with a threat to the safety, morals, health or general welfare of the community. *Baxley v. United States, supra*, 134 F. 2d 937. The latter is concerned with emergencies

causing need for the use of expressed powers granted to Congress by the Constitution. In this regard the *Stone* case had the following to say:

“‘Emergency does not create power.’ The decision of the Supreme Court above cited cannot be justified solely then upon the basis that war existed. But facts which create emergencies lay foundation for the use of express powers, the exercise of which could not be otherwise justified. Congress, in possession of the facts and no less than the courts restrained by the obligation to support and maintain the federal Constitution, passed the act requiring registration. In the light of all the circumstances in dealing with registration alone, ‘There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace.’”

See, also, *Van Bibber v. United States*, *supra*, 151 F. 2d 444, where it is stated at page 446:

“Appellant is mistaken in thinking that the Constitution exempts anyone from serving his country in some essential capacity or other *in a time of need*.” (Italics supplied.)

In *United States v. Herling*, *supra*, 120 F. 2d 236, referring to the Selective Training and Service Act of 1940, enacted in peacetime, the Court said:

“\* \* \* There was no reason for a continuance to procure evidence as to an emergency *vel non*, since that was irrelevant to the validity of the law \* \* \*.”

Thus it is apparent that the passage of a conscription act involves the exaction by Congress of a *duty owed by all citizens*, and not the *limiting* of individual rights

granted to the citizens under the First Amendment. In other words the liability to military service is a constitutionally created obligation of all citizens, co-extensive with the individual rights granted to them in the same instrument. The army power, when exerted, is complete and dominant to the extent of its exertion, *Selective Draft Law Cases*, 245 U. S. 366 (1917).

In his brief appellant raises the point that if the registration requirement be regarded as a means of obtaining statistical matter pertaining to male citizens eligible for draft, that end has been met by the defendant's voluntarily giving to his draft board his name, age and residence and "the further information that his conscience did not permit him to register." (Appellant's Brief, p. 13.) In this connection regulations propounded under the Selective Training and Service Act of 1948 are quoted to the effect that the registrar of the local draft board must register on behalf of one who himself refuses to register (pp. 13-15).

It is of course a widely accepted rule that normally matters not raised before the Trial Court may not be raised on appeal. See *Alberty v. United States*, 91 F. 2d 461 (Cal. App. 9, 1937); *Breedin v. United States*, 73 F. 2d 778 (Cal. App. 4, 1934). The last mentioned point was not brought before the Trial Court for consideration, and hence has been improperly raised.

In any event it would appear too plain to require extensive argument that one may not excuse his own violation of a valid criminal law on the ground that another is required by the same law to perform a duty resultant of such violation. In its instructions to the jury the Trial Court stated what was the law to have been observed by the appellant [T. 57, 58]. This law and regulations pro-

pounded thereunder require that the *appellant* register, and the sole issue in this case has been whether or not *he* did so register. Patently it would be folly to allow one subject to the terms of the act in question to observe it in the manner he sees fit. A similar point was raised by the appellant in *VanBibber v. United States, supra*, 151 F. 2d 444, where the said appellant had arbitrarily taken the position that he had already furnished ample evidence of his status to his local board and could not be required by it to do more to entitle him to a vindication of his rights, and that his conscience would not permit him to submit further to any machinery or processes of the Selective Service System. Answering this, and clearly articulating the relationship between the Congressional power to raise an army and individual rights under the First Amendment, the Court stated, at pages 446, 447:

“And the guarantee of the First Amendment of free exercise of religion, which appellant invokes, does not allow him or any other citizen to make his own rules or select his own methods for vindication of any rights to which he may be entitled under the Selective Training and Service Act or as a matter of religious freedom in general. It is only a guarantee that the law will protect his free exercise of religion through adequate, orderly and reasonable machinery and processes. No citizen who refuses to recognize and resort to such machinery and processes as the law has appropriately prescribed for that purpose can or will be heard to complain that his religious freedom has not been respected. Such a recognition of and submission to reasonable machinery and process are of the essence of the functioning of a democratic form of government and of its power to vindicate personal rights. That lesson no American citizen may refuse to learn.”

The purposes for which the Selective Service authorities may or may not find it necessary to register on behalf of one who himself refuses to do so, insofar as possible, are clearly not in issue here.

### Conclusion.

In conclusion it is respectfully submitted that enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 does not violate appellant's freedom of religion under the First Amendment, and consequently that the Trial Court did not err when it gave instruction 14-A [T. 6], and when it refused to give appellant's instructions No. 14 and No. 15 [T. 68].

Respectfully submitted,

ERNEST A. TOLIN,  
*United States Attorney,*

NORMAN W. NEUKOM,  
*Assistant U. S. Attorney, Chief of  
Criminal Division,*

SANDER L. JOHNSON,  
*Assistant U. S. Attorney,*  
*Attorneys for the United States of  
America, Appellee.*

1. The first part of the paper  
describes the general principles  
of the method proposed.  
2. The second part describes  
the details of the method  
and the results of the  
experiments.  
3. The third part describes  
the results of the  
experiments and the  
conclusions drawn from  
them.  
4. The fourth part describes  
the results of the  
experiments and the  
conclusions drawn from  
them.  
5. The fifth part describes  
the results of the  
experiments and the  
conclusions drawn from  
them.

No. 12374

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING.

---

JAMES D. RANGLES,

818 Transamerica Building, Los Angeles 14,

*Attorney for Appellant.*





No. 12374

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT L. CANNON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## PETITION FOR REHEARING.

---

The petitioner respectfully requests a rehearing in the above-entitled cause and that the decision be reversed for the reasons and upon the grounds following:

That the Court in its opinion decided this case basically on the same reasoning as the case of *Richter v. United States*, decided by this Court on April 5, 1950, and immediately before the instant case. In its opinion, this Court said, "This Court . . . has decided a case to all intents and purposes like the instant one, squarely against appellant's contention on both points mentioned."

We urge the Court that this case has one very decided difference than the *Richter* case and that the difference is a very material one.

While both cases raise the question of construing the law in the light of the First Amendment, this case has the following stipulation as to the facts involved, which take the facts entirely out of the hands of the trial court. The full stipulation is found in the transcript, pages 49 and 50. The important part we quote from the statement of the Court, as follows: “. . . that the reason why the defendant did not register and has not registered under the Selective Service Act of 1948 was because of his religious beliefs and convictions.”

Consequently, it was not an issue before the trial court, nor is it an issue before this Court, whether or not the requirement of registration violated the First Amendment of the Constitution of the United States.

In this case, because of the stipulation, it is no longer an issue whether or not registration under the Selective Service Act of 1948 interferes with the exercise of appellant's religion. It has already been stipulated, and this Court is bound by such stipulation, that the action of appellant for which he is here charged was *because* of his religious beliefs and convictions.

The First Amendment of the Constitution says: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . .”

The First Amendment to the Constitution is very clear. The stipulation in the case at bar is also very clear. *As to this appellant*, the requirement of registration under the Selective Service law prohibited the appellant in the free exercise of his religion.

Therefore, petitioner respectfully submits and sincerely urges that a rehearing should be had, believing that a re-examination of the record made by the Court after rehearing will result in a revision and reversal of the decision herein.

JAMES D. RANDLES,  
*Attorney for Appellant.*

### Certificate.

I, James D. Randles, do hereby certify that I am counsel for appellant in the above action and that this Petition for Rehearing is well-founded and that it is not interposed for delay.

JAMES D. RANDLES.



No. 12376

---

United States  
Court of Appeals  
For the Ninth Circuit.

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CITY AND COUNTY OF HONOLULU,  
Appellant,

VS.

UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

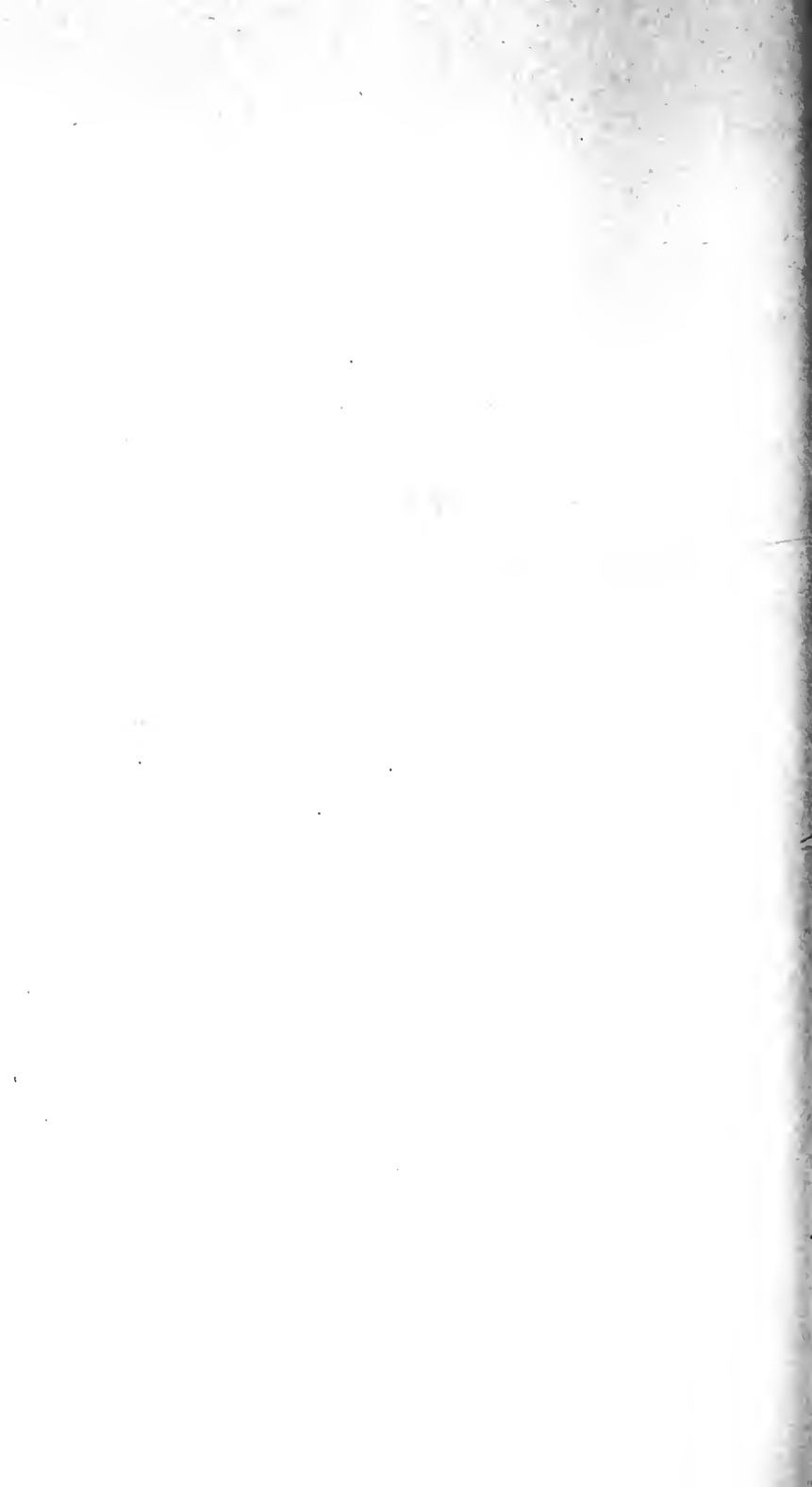
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Appeal from the United States District Court  
District of Hawaii.

FILED

JAN 4 - 1950

PAUL P. O'BRIEN



**No. 12376**

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

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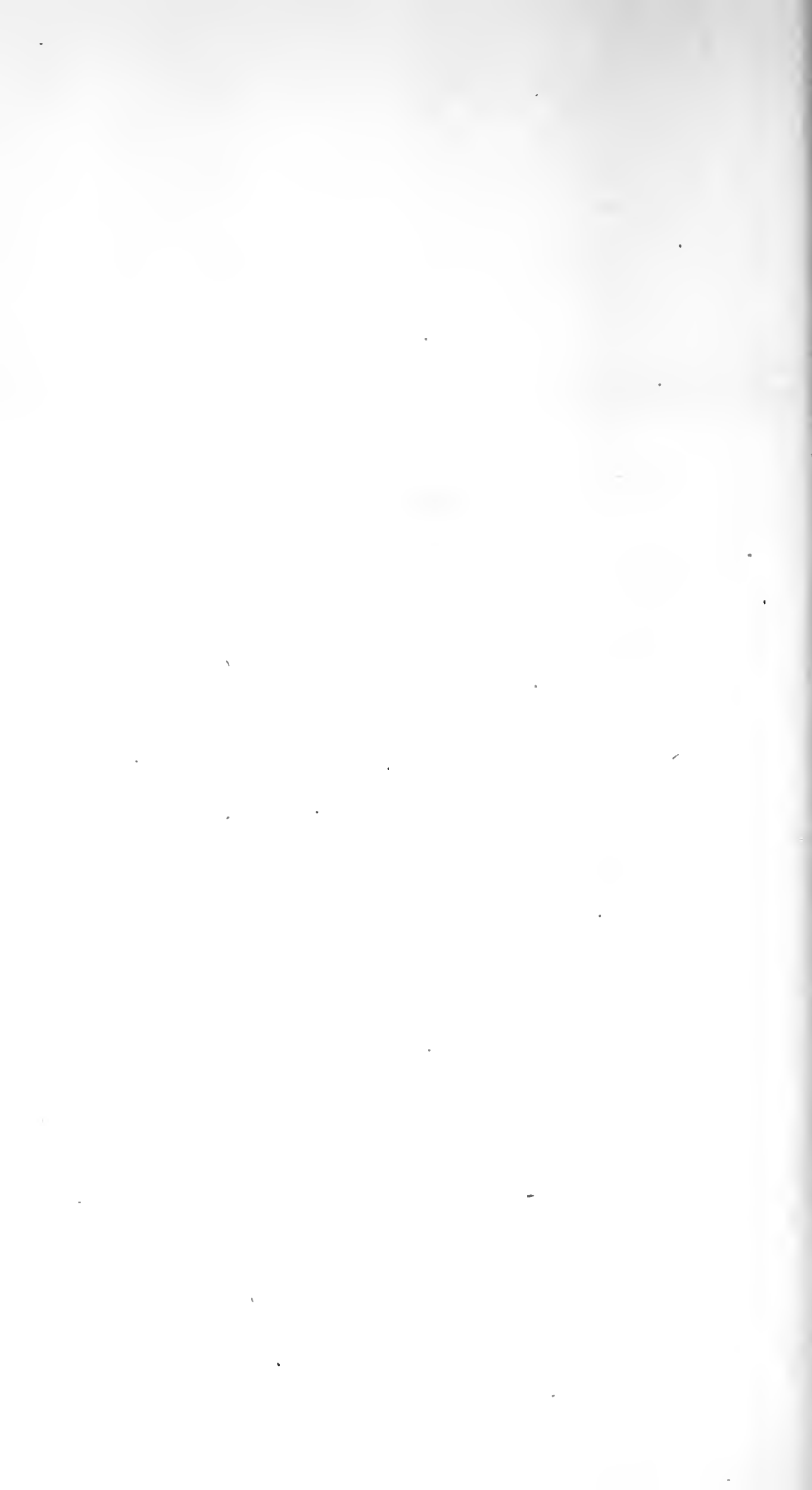
CITY AND COUNTY OF HONOLULU,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court**  
**District of Hawaii.**





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF  
ATTORNEYS OF RECORD

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WILFORD D. GODBOLD, ESQ.,

City and County Attorney,

FRANK A. McKINLEY, ESQ.

Deputy City and County Attorney,  
City Hall,  
Honolulu, T. H.

In the District Court of the United States  
for the District of Hawaii

October Term, 1945

Civil No. 695

UNITED STATES OF AMERICA,

Petitioner,

vs.

34.03 ACRES OF LAND, MORE OR LESS LO-  
CATED AT PEARL CITY PENINSULA,  
OAHU, TERRITORY OF HAWAII, CITY  
AND COUNTY OF HONOLULU; TERRI-  
TORY OF HAWAII; FRANK L. JAMES,  
et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by  
Charles F. Rathbun, Special Assistant to the Attor-  
ney General, acting under the instructions of the At-  
torney General of the United States and at the re-  
quest of the Secretary of Navy and respectfully  
represents to the Court:

#### I.

That this proceeding is instituted under the au-  
thority of divers and Sundry Acts of Congress,  
among them the following:

The Act of Congress approved March 27, 1942  
(Public Law 507 — 77th Congress) as  
amended by

The Act of Congress approved December 20,  
1944  
(Public Law 509—78th Congress)

The Act of Congress approved June 26, 1943  
(Public Law 92—78th Congress)

The Act of Congress approved June 22, 1944  
(Public Law 347—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands being all streets, roads, and highways (except Lehua Avenue) and lie within the perimeter of the description shown on Exhibit "A" hereto attached and made a part hereof as though set forth at length and within the perimeter shown on map attached hereto and marked Exhibit "B", subject to existing public utility easements and all other public utility rights of any nature whatsoever.

## II.

That the lands sought to be condemned are located at Pearl City Peninsula, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action is fee simple title to said streets, roads, and highways (except Lehua Avenue), subject to existing public utility easements and all other public utility rights of any nature whatsoever, and said lands are to be used in connection with the Pearl Harbor Security Strip Perimeter Acquisition.

## IV.

That the City and County of Honolulu; Territory of Hawaii; Frank L. James, and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said lands, are made defendants herein.

## V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the public use of said land and that he has, therefore, determined that possession of said lands, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the lands described and shown herein on said Exhibits "A" and "B."

Wherefore, your petitioner prays this Honorable

Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to grant immediate possession thereof to the United States of America; that upon payment into the registry of this Court for the use of the persons entitled thereto of the sums adjudged to be full compensation for the condemnation of said lands, that title of said land be vested in the United States of America in fee simple, subject to the conditions herinabove recited, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

AFFIDAVIT

District of Hawaii,  
City and County of Honolulu—ss.

Charles F. Rathbun, being first duly sworn on oath, deposes and says: That he is a Special Assistant to the Attorney General of the United States, that he has read the foregoing Petition for Condemnation and knows the contents thereof and that the

same is true to the best of his knowledge, information and belief.

/s/ CHARLES F. RATHBUN.

Subscribed and sworn to before me this 8th day of January, 1946.

[Seal] /s/ THOS. C. CUMMINS,  
Deputy Clerk of the United States District Court for  
the District of Hawaii.

### EXHIBIT "A"

#### Legal Description of Pearl City Peninsula

Situated on the South side of the Oahu Railway and Land Company's 40-foot right-of-way.

At Manana and Waimano, Ewa, Oahu, T. H.

Beginning at the northwest corner of this tract of land, being also the northwest corner of Lot 2-A, Section 3 as shown on Map 9, filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application 945, in the south line of Oahu Railway and Land Company's 40-foot right-of-way and on the east bank of Waiawa Stream, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church," being 1024.13 feet south and 1111.96 feet east, thence running by azimuths measured clockwise from south:

1. Along the south line of the Oahu Railway and Land Company's 40-foot right-of-way to a point, the coordinates of said point referred to Government



Exhibit "A"—(Continued)

Survey Triangulation Station "Ewa Church" being 723.73 feet south and 4,938.47 feet East;

2.  $67^{\circ} 51' 20.14$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

3.  $341^{\circ} 50' 24.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

4.  $325^{\circ} 00' 58.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

5.  $318^{\circ} 35' 54.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

6.  $301^{\circ} 00' 36.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

7.  $325^{\circ} 40' 26.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

8.  $339^{\circ} 00' 51.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

9.  $337^{\circ} 40' 78.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

10.  $347^{\circ} 40' 30.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

11.  $356^{\circ} 05' 26.20$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

12.  $67^{\circ} 30' 161.10$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

13.  $71^{\circ} 10' 247.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

14.  $342^{\circ} 35' 207.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

## Exhibit "A"—(Continued)

15.  $340^{\circ} 50' 64.0$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu;

16.  $78^{\circ} 48' 231.94$  feet along the remainder of Grant 215 to Nahi;

17.  $337^{\circ} 43' 137.40$  feet along the remainder of R. P. 4475, L. C. Aw. 7713 Apana 47 to V. Kamamalu, to the high water mark of Pearl Harbor;

18. Thence along the high water mark of Pearl Harbor, in all its turns and windings to the mouth of Waiawa Stream;

19. Thence along the east bank of Waiawa Stream to the point of beginning.

[Endorsed]: Filed January 8, 1946.

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[Title of District Court and Cause.]

## PETITION FOR CONDEMNATION.

## Appearance

Comes now the Territory of Hawaii, one of the defendants herein, by Michiro Watanabe, Deputy Attorney General of said Territory, its attorney, and makes and files this its appearance in the above entitled matter.

Dated at Honolulu, T. H., this 9th day of January, 1946.

TERRITORY OF HAWAII,

By /s/ MICHIRO WATANABE,

Deputy Attorney General,  
its attorney.

[Endorsed]: Filed January 10, 1946.

[Title of District Court and Cause.]

APPEARANCE

Comes now Arthur H. Spitzer, Esq., Deputy City and County Attorney, and files an appearance herein in behalf of the City and County of Honolulu, one of the defendants named in the above entitled cause.

Dated at Honolulu, T. H., this 16th day of January, A. D., 1946.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ ARTHUR H. SPITZER,  
Deputy City and County  
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed January 16, 1946.

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[Title of District Court and Cause.]

ORDER AMENDING PETITION

Upon motion of the Petitioner herein,

It Is Hereby Ordered that the Petition herein be amended by adding to said Petition after the words and letters, Exhibit "B" in the third line from the top of Page 2 of said Petition the following:

"and described and shown on Exhibits "C," "C-1," "C-2," "C-3," "C-4," "C-5," "C-6" and Exhibits "D," "D-1," "D-2," and "D-3," which said Exhibits are hereto attached and made a part hereof as though set forth at length."

And that the said Exhibits, copies of which are attached to this order, are to be made a part of said Petition.

Dated: Honolulu, T. H., this 31st day of May, 1946.

/s/ D. E. METZGER,

Judge of the United States District Court for the District of Hawaii.

### EXHIBIT C

Descriptions of roads within the Pearl City Lots (Peninsula Section) Situate at Manana and Waimano, Ewa, Oahu, T. H.

Apparent Owner—Territory of Hawaii

Being Portions of the Ili of Kaholona, Portion of Apana 2 of Land Patent 8168 on Land Commission Award 8305, Apana 2 to P. Kanoa and Portions of the Ili of Opukaula, Royal Patent 4475, Land Commission Award 7713, Apana 47 to V. Kamamalu.

A. Lying within portion "T," U. S. Naval Pearl Harbor Perimeter Acquisition (all as delineated on 14th Naval District drawing No. OA-N1-1132)

#### 1. Kirkbride Avenue

Beginning at the Southwest corner of this parcel of land, being also the Southwest corner of Ashley Avenue and the Northeast corner of Block 40 of the Pearl City Peninsula Lots (Tract 22, Portion "V" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Sta-

Exhibit C—(Continued)

tion “Banning” being 1151.45 feet North and 1974.97 feet East, and running by azimuths measured clockwise from True South:

1. 167° 24′ 680.00 feet across Ashley Avenue and along the Easterly side of Block 43 of the Pearl City Peninsula Lots (Tracts 85, 87, 88, 90, 92, 94 and 99, Portion “S” of Perimeter Acquisition);

2. 257° 24′ 80.00 feet along the Southerly side of Palm Avenue;

3. 347° 24′ 680.00 feet along the Westerly side of Block 42 of the Pearl City Peninsula Lots (Tracts 1, 2 and 3, Portion “T” of Perimeter Acquisition) and a remainder of L. C. Aw. 7713, Apana 47 to V. Kamamalu;

4. 77° 24′ 80.00 feet across Kirkbride Avenue to the point of beginning and containing an area of 54,400 square feet.

2. Palm Avenue

Beginning at the Southwest corner of this parcel of land, being also the Northeast corner of Block 43 of the Pearl City Peninsula Lots (Tract 85, Portion “S” of Perimeter Acquisition) and the Northwest corner of Kirkbride Avenue, the coordinates of which referred to Government Survey Triangulation Station “Banning” being 1815.07 feet North and 1826.63 feet East, and running by azimuths measured clockwise from true South:

1. 167° 24′ 62.00 feet across Palm Avenue;

## Exhibit C—(Continued)

2. 257° 24' 80.00 feet along Grant 8371 to M. Elnora Sturgeon;

3. 347° 24' 62.00 feet along Grant 8371 to M. Elnora Sturgeon and a remainder of L. C. Aw. 7713, Apana 47 to V. Kamamalu;

4. 77° 24' 80.00 feet along the Northerly side of Kirkbride Avenue to the point of beginning and containing an area of 4,960 square feet.

B. Lying within Portion "U" U. S. Naval Pearl Harbor Perimeter Acquisition (all as delineated on 14th Naval District drawing No. OA-N1-1133)

1. Robinson Avenue

Beginning at the Southwest corner of this parcel of land, on the Northerly side of Franklin Avenue, being also the Southeast corner of Block 34 of the Pearl City Peninsula Lots (Tract 22, Portion "U" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 364.42 feet South and 1061.05 feet East, and running by azimuths measured clockwise from true South:

1. 167° 24' 1280.00 feet along the Easterly side of Block 34 of the Pearl City Peninsula Lots (Tracts 22, 21, 20, 36, 35, 34, 18 and 17, Portion "U" of Perimeter Acquisition), the Easterly side of Lanakila Avenue and the Easterly side of Block 37 of the Pearl City Peninsula Lots (Tracts 8, 7, 6, 5, 4, 3, 2 and 1 Portion "U" of Perimeter Acquisition);

Exhibit C—(Continued)

2. 257° 24' 82.60 feet along the Southerly side of Ashley Avenue;

3. 347° 24' 1280.00 feet along the Westerly side of Block 38 of the Pearl City Peninsula Lots, Lanakila Avenue and Block 33 of the Pearl City Peninsula Lots (Tracts 1, 2-A, 65, 37, 39, 44, 46 and 47, Portion "V" of Perimeter Acquisition);

4. 77° 24' 82.60 feet along the Northerly side of Franklin Avenue to the point of beginning and containing an area of 105,728 square feet.

2. Laniwai Avenue

Beginning at the Southwest Corner of this parcel of land at the Northwest corner of Franklin Avenue and on the Easterly side of U. S. Naval Reservation, Civil No. 505, the coordinates of which referred to Government Survey Triangulation Station "Bran-ning" being 447.25 feet South and 690.52 feet East, and running by azimuths measured clockwise from true South:

1. 167° 20' 347.30 feet along U. S. Naval Reservation, Civil No. 505;

2. 167° 26' 30" 84.78 feet along government road, 60 feet wide;

3. 167° 24' 847.92 feet along land owned by the Oahu Railway and Land Co., Lanakila Avenue and Block 36 of the Pearl City Peninsula Lots (Tracts

## Exhibit C—(Continued)

31, 30 and 29, Portion "U" of Perimeter Acquisition);

4. 257° 24' 80.00 feet along the Southerly side of Ashley Avenue;

5. 347° 24' 1280.00 feet along the Westerly side of Block 37 of the Pearl City Peninsula Lots, Lanakila Avenue and Block 34 of the Pearl City Peninsula Lots (Tracts 9, 10, 11, 12, 13, 14, 15, 16, 23, 24, 37, 19, 25, 26, 27, 28 and 22, Portion "U" of Perimeter Acquisition);

6. 77° 24' 79.67 feet along the Northerly side of Franklin Avenue to the point of beginning and containing an area of 102,361 square feet.

3. Lanakila Avenue

Part 1

Beginning at the Northeast corner of this parcel of land at the Southeast corner of Block 36 of the Pearl City Peninsula Lots (Tract 30, Portion "U" of Perimeter Acquisition) and on the Westerly side of Laniwai Avenue, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 216.30 feet North and 541.85 feet East, and running by azimuths measured clockwise from true South:

1. 347° 24' 80.00 feet along the Westerly side of Laniwai Avenue;

2. 77° 24' 252.77 feet along the Northerly side of land owned by the Oahu Railway and Land Co.



## Exhibit C—(Continued)

(Tract 31, Portion “U” of Perimeter Acquisition) and along government road, 60 feet wide;

3.  $167^{\circ} 24' 80.00$  feet across Lanakila Avenue (Easterly side of Parcel 32, Portion “U” of Perimeter Acquisition);

4.  $257^{\circ} 24' 252.77$  feet along the Southerly side of Block 36 of the Pearl City Peninsula Lots (Tract 30, Portion “U” of Perimeter Acquisition) to the point of beginning and containing an area of 20,222 square feet.

## Part 2

Beginning at the Southwest corner of this parcel of land, on the Easterly side of Laniwai Avenue and at the Northwest corner of Block 34 of the Pearl City Peninsula Lots (Tract 23, Portion “U” of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station “Banning” being 155.68 feet North and 637.38 feet East, and running by azimuths measured clockwise from true South:

1.  $167^{\circ} 24' 80.00$  feet along the Easterly side of Laniwai Avenue;

2.  $257^{\circ} 24' 300.00$  feet along the Southerly side of Block 37 of the Pearl City Peninsula Lots (Tracts 16 and 8, Portion “U” of Perimeter Acquisition);

3.  $347^{\circ} 24' 80.00$  feet along the Westerly side of Robinson Avenue;

4.  $77^{\circ} 284' 300.00$  feet along the Northerly side of

## Exhibit C—(Continued)

Block 34 of the Pearl City Peninsula Lots (Tracts 17 and 23, Portion "U" of Perimeter Acquisition) to the point of beginning and containing an area of 24,000 square feet.

4. 60-foot Road Between Laniwai and Lanakila Avenues

Beginning at the Northeast corner of this parcel of land at the Westerly corner of land owned by the Oahu Railway and Land Co. (Tract 31, Portion "U" of Perimeter Acquisition) and on the Southerly side of Lanakila Avenue, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 101.60 feet North and 395.42 feet East, and running by azimuths measured clockwise from true South:

1.  $302^{\circ} 24'$  237.48 feet along land owned by the Oahu Railway and Land Co. (Tract 31, Portion "U" of Perimeter Acquisition);

2.  $347^{\circ} 26' 30''$  84.78 feet along the Westerly side of Laniwai Avenue;

3.  $122^{\circ} 24'$  357.37 feet along U. S. Naval Reservation, Civil No. 505, and along Block 35 of the Pearl City Peninsula Lots (Tract 33, Portion "U" of Perimeter Acquisition);

4.  $257^{\circ} 24'$  84.85 feet along the Southerly side of Lanakila Avenue to the point of beginning and containing an area of 17,844 square feet.

C. Lying within Portion "V," U. S. Naval Pearl Harbor Perimeter Acquisition (all as delineated on 14th Naval District drawing No. OA-NI-1134)

## Exhibit C—(Continued)

## 1. Lowella Avenue

Beginning at the Southwest corner of this parcel of land, on the Northerly side of Franklin Avenue, being also the Southeast corner of Block 33 of the Pearl City Peninsula Lots (Tract 49, Portion "V" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 280.98 feet South and 1434.45 feet East, and running by azimuths measured clockwise from true South:

1.  $167^{\circ} 24'$  1280.00 feet along the Easterly side of Block 33 of the Pearl City Peninsula Lots (Tracts 49, 45, 43, 42, 41, 40 and 38, Portion "V" of Perimeter Acquisition), across Lanakila Avenue and along the Easterly side of Block 38 of the Pearl City Peninsula Lots (Tracts 2-B, 3 and 1, Portion "V" of Perimeter Acquisition);

2.  $257^{\circ} 24'$  80.00 feet along the Southerly side of Ashley Avenue;

3.  $347^{\circ} 24'$  1280.00 feet along the Westerly side of Block 39 of the Pearl City Peninsula Lots (Tracts 4, 7, 9, 11, 13, 15 and 16, Portion "V" of Perimeter Acquisition), across Lanakila Avenue and along the Westerly side of Block 32 of the Pearl City Peninsula Lots (Tracts 50, 53, 55, 56, 57, 58, 60, 62 and 64, Portion "V" of Perimeter Acquisition);

4.  $77^{\circ} 24'$  80.00 feet along the Northerly side of Franklin Avenue to the point of beginning and containing an area of 102,400 square feet.

## Exhibit C—(Continued)

## 2. Lanakila Avenue

## Part 1

Beginning at the Southwest corner of this parcel of land, on the Easterly side of Robinson Avenue, being also the Northwest corner of Block 33 of the Pearl City Peninsula Lots and the Northwest corner of Tract 37, Portion "V" of Perimeter Acquisition, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 239.13 feet North and 1010.79 feet East, and running by azimuths measured clockwise from true South:

1. 167° 24' 80.00 feet across Lanakila Avenue;
2. 257° 24' 300.00 feet along the Southerly side of Block 38 of the Pearl City Peninsula Lots (Tracts 65 and 2-B, Portion "V" of Perimeter Acquisition);
3. 347° 24' 80.00 feet across Lanakila Avenue;
4. 77° 24' 300.00 feet along the Northerly side of Block 33 of the Pearl City Peninsula Lots (Tracts 38 and 37, Portion "V" of Perimeter Acquisition) to the point of beginning and containing an area of 24,000 square feet.

## Part 2

Beginning at the Southwest corner of this parcel of land, on the Easterly side of Lowella Avenue, being also the Northwest corner of Block 32 of the Pearl City Peninsula Lots and the Northwest corner of Tract 50, Portion "V" of Perimeter Acquisition,

## Exhibit C—(Continued)

the coordinates of which referred to Government Survey Triangulation Station “Banning” being 322.02 feet North and 1381.64 feet East, and running by azimuths measured clockwise from true South:

1. 167° 24′ 80.00 feet across Lanakila Avenue;
2. 257° 24′ 300.00 feet along the Southerly side of Block 39 of the Pearl City Peninsula Lots (Tracts 16, 17, and 14, Portion “V” of Perimeter Acquisition;
3. 347° 24′ 80.00 feet across Lanakila Avenue.
4. 77° 24′ 300.00 feet along the Northerly side of Block 32 of the Pearl City Peninsula Lots (Tracts 52, 51 and 50, Portion “V” of Perimeter Acquisition) to the point of beginning and containing an area of 24,000 square feet.

## Part 3

Beginning at the Northwest corner of this parcel of land, on the Easterly side of Lehua Avenue, being also the Southwest corner of Block 40 of the Pearl City Peninsula Lots and the Southwest corner of Tract 32, Portion “V” of Perimeter Acquisition, the coordinates of which referred to Government Survey Triangulation Station “Banning” being 487.33 feet North and 1754.56 feet East, and running by azimuths measured clockwise from true South:

1. 257° 24′ 360.00 feet along the Southerly side of Block 40 of the Pearl City Peninsula Lots (Tracts 32, 34, 35 and 36, Portion “V” of Perimeter Acquisition);

## Exhibit C—(Continued)

2. 347° 24' 80.00 feet along the Westerly side of Kirkbride Avenue;

3. 77° 24' 360.00 feet along the Northerly side of Land Court Application 912 Parcel B (Tract 2, Portion "W" of Perimeter Acquisition);

4. 167° 24' 80.00 feet across Lanakila Avenue to the point of beginning and containing an area of 28,800 square feet.

3. Kirkbride Avenue

Beginning at the Northwest corner of this parcel of land, on the Southerly side of Ashley Avenue, being also the Northeast corner of Block 40 of the Pearl City Peninsula Lots (Tract 22, Portion "V" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 1151.42 feet North and 1975.00 feet East, and running by azimuths measured clockwise from true South:

1. 257° 24' 80.00 feet across Kirkbride Avenue;

2. 347° 24' 680.00 feet along the Westerly side of Block 41 of the Pearl City Peninsula Lots and Lanakila Avenue (Tracts 4, 5 and 6, Portion "T" of Perimeter Acquisition, and Tract 1, Portion "W" of Perimeter Acquisition);

3. 77° 24' 80.00 feet across Kirkbride Avenue;

4. 167° 24' 680.00 feet across Lanakila Avenue and along the Easterly side of Block 40 of the Pearl City Peninsula Lots (Tracts 36, 33, 31, 29, 27, 25,

Exhibit C—(Continued)

21 and 22, Portion “V” of Perimeter Acquisition) to the point of beginning and containing an area of 54,400 square feet.

D. Lying Within Portion “W,” U. S. Naval Pearl Harbor Perimeter Acquisition (All As Delineated On 14th Naval District Drawing No. OA-NI-1135)

1. Kirkbride Avenue

Beginning at the Southwest corner of this parcel of land, on the Northerly side of Franklin Avenue, being also the Southeast corner of Land Court Application 912, Parcel B (Tract 2, Portion “W” of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station “Banning” being 97.72 feet South and 2254.20 feet East, and running by azimuths measured clockwise from true South:

1. 167° 24′ 600.00 feet along the Easterly side of Land Court Application 912, Parcel B (Tract 2, Portion “W” of Perimeter Acquisition);

2. 257° 24′ 80.00 feet across Kirkbride Avenue;

3. 347° 24′ 600.00 feet along the Westerly side of Land Court Application 912, Parcel A (Tract 3, Portion “W” of Perimeter Acquisition);

4. 77° 24′ 80.00 feet along the Northerly side of Franklin Avenue to the point of beginning and containing an area of 1.102 acres.

2. Lanakila Avenue

Beginning at the Northwest corner of this parcel

## Exhibit C—(Continued)

of land, on the Easterly side of Kirkbride Avenue, being also the Southwest corner of Block 41 of the Pearl City Peninsula Lots (Tract 1, Portion "W" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 583.35 feet North and 2183.93 feet East, and running by azimuths measured clockwise from true South:

1. 257° 24' 380.00 feet along the Southerly side of Block 41 of the Pearl City Peninsula Lots (Tract 1, Portion "W" of Perimeter Acquisition);

2. 347° 24' 80.00 feet along a remainder of L. C. Aw. 7713, Apana 47 to V. Kamamalu (Tract 4, Portion "W" of Perimeter Acquisition);

3. 77° 24' 380.00 feet along Land Court Application 912, Parcel A (Tract 3, Portion "W" of Perimeter Acquisition);

4. 167° 24' 80.00 feet along the Easterly side of Kirkbride Avenue to the point of beginning and containing an area of 0.698 acre.

E. Lying Within Portion "X", U. S. Naval Pearl Harbor Perimeter Acquisition (All As Delineated On 14th Naval District Drawing No. OA-NI-1136)

1. Coral Avenue

Beginning at the Southeast corner of this parcel of land, being also the Southwest corner of Aloha Avenue, and on the Northerly boundary of U. S.



## Exhibit C—(Continued)

Naval Reservation, Civil No. 515, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 934.41 feet South and 1097.93 feet East, and running by azimuths measured clockwise from true South:

1.  $77^{\circ} 24'$  79.98 feet along U. S. Naval Reservation, Civil No. 515;

2.  $167^{\circ} 22'$  217.22 feet along U. S. Naval Reservation Civil No. 505; then along U. S. Naval Reservation, Civil No. 505, on a curve to the left, with a radius of 197.23 feet, the chord azimuth and distance being:

3.  $138^{\circ} 53' 10''$  188.10 feet;

4.  $110^{\circ} 24' 30''$  43.65 feet along U. S. Naval Reservation, Civil No. 505; thence along U. S. Naval Reservation, Civil No. 505, on a curve to the right, with a radius of 186.30 feet, the chord azimuth and distance being:

5.  $138^{\circ} 52' 10''$  177.58 feet;

6.  $167^{\circ} 20'$  2.00 feet along U. S. Naval Reservation, Civil No. 505;

7.  $257^{\circ} 24'$  292.27 feet along the Southerly side of Laniwai Avenue and Block 34 of the Pearl City Peninsula Lots (Tract 22, Portion "U" of Perimeter Acquisition);

8.  $347^{\circ} 24'$  482.00 feet along the Westerly side of Franklin Avenue and along the Westerly side of Block 28 of the Pearl City Peninsula Lots (Tracts 1,

## Exhibit C—(Continued)

9 and 10, Portion "X" of Perimeter Acquisition);

9. 348° 03' 30" 82.31 feet along the Westerly side of Aloha Avenue to the point of beginning and containing an area of 82,104 square feet.

2. Franklin Avenue

Beginning at the Northeast corner of this parcel of land, on the Westerly side of Lehua Avenue, being also the Southeast corner of Block 32 of the Pearl City Peninsula Lots (Tract 64, Portion "V" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 198.07 feet South and 1805.29 feet East, and running by azimuths measured clockwise from true South:

1. 347° 24' 82.00 feet along the Westerly side of Lehua Avenue;

2. 77° 24' 850.00 feet along the Northerly side of Block 28 of the Pearl City Peninsula Lots (Tracts 7, 6, 5, 4, 3, 2 and 1, Portion "X" of Perimeter Acquisition);

3. 167° 24' 82.00 feet along the Easterly side of Coral Avenue;

4. 257° 24' 850.00 feet along the Southerly side of Block 34 of the Pearl City Peninsula Lots, Robinson Avenue, Block 33 of the Pearl City Peninsula Lots, Lowella Avenue and Block 32 of the Pearl City Peninsula Lots (Tract 22, Portion "U" of Perimeter Acquisition and Tracts 47, 48, 49 and 64,

## Exhibit C—(Continued)

Portion "V" of Perimeter Acquisition) to the point of beginning and containing an area of 69,700 square feet.

## 3. Aloha Avenue

Beginning at the Southwest corner of this parcel of land, on the Easterly side of Coral Avenue and on the Northerly boundary of U. S. Naval Reservation, Civil No. 515, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 934.41 feet South and 1097.93 feet East, and running by azimuths measured clockwise from true South:

1.  $168^{\circ} 03' 30''$  82.31 feet along the Easterly side of Coral Avenue;

2.  $257^{\circ} 24'$  850.00 feet along the Southerly side of Block 28 of the Pearl City Peninsula Lots (Tracts 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, Portion "X" of Perimeter Acquisition);

3.  $347^{\circ} 24'$  82.30 feet along the Westerly side of Lehua Avenue;

4.  $77^{\circ} 24'$  850.95 feet along U. S. Naval Reservation, Civil No. 515, to the point of beginning and containing an area of 69,997 square feet.

F. Lying Within Portion "Y", U. S. Naval Pearl Harbor Perimeter Acquisition (All As Delineated On 14th Naval District Drawing No. OA-NI-1137)

## Exhibit C—(Continued)

## 1. Coral Avenue

Beginning at the West corner of this parcel of land, on the Northerly boundary of U. S. Naval Reservation, Civil No. 515, being also the Southeast corner of Aloha Avenue, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 640.52 feet South and 2411.36 feet East, and running by azimuths measured clockwise from true South:

Along the Easterly side of Aloha Avenue, on a curve to the right, with a radius of 755.70 feet, the chord azimuth and distance being:

1.  $193^{\circ} 40' 07''$  26.33 feet;

2.  $194^{\circ} 40' 45.83$  feet along the Easterly side of Aloha Avenue; thence along the Easterly side of Aloha Avenue and Block 29 of the Pearl City Peninsula Lots (Tracts 11 and 12, Portion "Y" of Perimeter Acquisition), on a curve to the right, with a radius of 960.00 feet, the chord azimuth and distance being:

3.  $200^{\circ} 10' 184.02$  feet;

4.  $205^{\circ} 40' 94.20$  feet along the Easterly side of Block 29 of the Pearl City Peninsula Lots (Tract 12, Portion "Y" of Perimeter Acquisition); thence along the Easterly side of Block 29 of the Pearl City Peninsula Lots (Tracts 12 and 4, Portion "Y" of Perimeter Acquisition), on a curve to the left, with a radius of 300.00 feet, the chord azimuth and distance being:

Exhibit C—(Continued)

5. 186° 32' 196.66 feet;
6. 167° 24' 85.16 feet along the Easterly side of Block 29 of the Pearl City Peninsula Lots (Tract 4, Portion "Y" of Perimeter Acquisition) and across Franklin Avenue;
7. 257° 24' 170.00 feet along the Southerly side of Land Court Application 912, Parcel A (Tract 3, Portion "W" of Perimeter Acquisition);
8. 347° 24' 82.00 feet along a remainder of L. C. Aw. 7713, Apana 47 to V. Kamamalu (Tract 4, Portion "W" of Perimeter Acquisition);
9. 77° 24' 1.41 feet along the Northerly side of Block 25 of the Pearl City Peninsula Lots (Tract 13, Portion "Y" of Perimeter Acquisition); thence along the Northwesterly side of Block 25 of the Pearl City Peninsula Lots (Tracts 13 and 14, Portion "Y" of Perimeter Acquisition), on a curve to the left, with a radius of 90.00 feet, the chord azimuth and distance being:
10. 42° 24' 45" 103.21 feet;
11. 7° 25' 30" 78.86 feet along the Westerly side of Block 25 of the Pearl City Peninsula Lots (Tracts 14 and 15, Portion "Y" of Perimeter Acquisition); thence along the Westerly side of Block 25 of the Pearl City Peninsula Lots (Tracts 15 and 16, Portion "Y" of Perimeter Acquisition), on a curve to the right, with a radius of 380.00 feet, the chord azimuth and distance being:

## Exhibit C—(Continued)

12.  $16^{\circ} 32' 45''$  120.47 feet;

13.  $25^{\circ} 40' 94.20$  feet along the Westerly side of Block 25 of the Pearl City Peninsula Lots (Tracts 16 and 17, Portion "Y" of Perimeter Acquisition); thence along the Westerly side of Block 25 of the Pearl City Peninsula Lots (Tracts 17, 18, 19 and 20, Portion "Y" of Perimeter Acquisition), on a curve to the left, with a radius of 880.00 feet, the chord azimuth and distance being:

14.  $20^{\circ} 10'$  168.69 feet;

15.  $14^{\circ} 40' 31.16$  feet along the Westerly side of Block 25 of the Pearl City Peninsula Lots (Tract 20, Portion "Y" of Perimeter Acquisition) and along U. S. Naval Reservation, Civil No. 515;

16.  $77^{\circ} 24' 89.48$  feet along U. S. Naval Reservation, Civil No. 515 to the point of beginning and containing an area of 60,046 square feet.

2. Aloha Avenue

Beginning at the Southeast corner of this parcel of land, on the Westerly side of Coral Avenue and on the Northerly boundary of U. S. Naval Reservation, Civil No. 515, the coordinates of which referred to Government Survey Triangulation Station "Banning" being 640.52 feet South and 2411.36 feet East, and running by azimuths measured clockwise from true South:

Exhibit C—(Continued)

1.  $77^{\circ} 24'$  394.96 feet along U.S. Naval Reservation, Civil No. 515;

2.  $167^{\circ} 24'$  82.00 feet along the Easterly side of Lehua Avenue;

3.  $257^{\circ} 24'$  436.95 feet along the Southerly side of Block 29 of the Pearl City Peninsula Lots (Tracts 8, 9, 10 and 11, and Portion "Y" of Perimeter Acquisition); thence along the Westerly side of Coral Avenue, on a curve to the left, with a radius of 960.00 feet, the chord azimuth and distance being:

4.  $15^{\circ} 15' 45''$  19.97 feet;

5.  $14^{\circ} 40'$  45.83 feet along the Westerly side of Coral Avenue; thence along the Westerly side of Coral Avenue, on a curve to the left, with a radius of 755.70 feet, the chord azimuth and distance being:

6.  $13^{\circ} 40' 07''$  26.33 feet to the point of beginning and containing an area of 34,085 square feet.

3. Franklin Avenue

Beginning at the Southeast corner of this parcel of land, on the Westerly side of Coral Avenue, being also the Northeast corner of Block 29 of the Pearl City Peninsula Lots (Tract 4, Portion "Y" of Perimeter Acquisition), the coordinates of which referred to Government Survey Triangulation Station "Banning" being 114.48 feet South and 2555.11 feet East, and running by azimuths measured clockwise from true South:

## Exhibit C--(Continued)

1. 77° 24' 650.00 feet along the Northerly side of Block 29 of the Pearl City Peninsula Lots (Tracts 4, 3, 2 and 1, Portion "Y" of Perimeter Acquisition);
2. 167° 24' 82.00 feet along the Easterly side of Lehua Avenue;
3. 257° 24' 650.00 feet along the Southerly side of Land Court Application 912, Parcel B (Tract 2, Portion "W" of Perimeter Acquisition), Kirkbride Avenue and Land Court Application 912, Parcel A (Tract 3, Portion "W" of Perimeter Acquisition);
4. 347° 24' 82.00 feet along the Westerly side of Coral Avenue to the point of beginning and containing an area of 53,300 square feet.

## EXHIBIT D

Descriptions Of Roads Within A Portion Of The  
Pearl City Peninsula Situated At Manananui  
And Waimano, Ewa, Oahu, T. H.

Waikahe Avenue

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Frank L. James—(Owner)

Being Lots 370, 371 and 372 of Land Court  
Application 601

(As shown on Map 6, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=28,195 Square Feet

(See 14th Naval District Drawing  
No. OA-N1-1468)



Exhibit D—(Continued)

Being Waipuna Avenue And A Portion  
Of Beryl Street

Situated at Manananui and Waimano, Ewa,  
Oahu, T. H.

Frank L. James And City And County  
Of Honolulu—(Owners)

Being Lots 366, 367, 368, 403, 2-B-1 and 2-C-1-A  
of Land Court Application 601

(As shown on Maps 5 and 6, filed in the Office  
of the Bureau of Conveyances at  
Honolulu, Oahu, T. H.)

Total Area=70,729 Square Feet

(See 14th Naval District Drawing  
No. OA-N1-1468)

Waieli Avenue

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Frank L. James—(Owner)

Being Lots 343 and 369 of Land Court  
Application 601

(As shown on Map 6, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=22,159 Square Feet

(See 14th Naval District Drawing  
No. OA-N1-1468)

Being A Portion Of Waiauau Avenue  
Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

City And County Of Honolulu—(Owner)

*City and County of Honolulu*

## Exhibit D—(Continued)

Being Lots 1-B-3-A and 390-B of  
Land Court Application 601

(As shown on Maps 6 and 8, filed in the  
Office of the Bureau of Conveyances,  
at Honolulu, Oahu, T. H.)

Total Area=5201 Square Feet

(See 14th Naval District Drawing  
No. OA-N 1-1468

## Waipuilani Avenue

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

City And County Of Honolulu—(Owner)

Being Lots 362, 363, 380, 1-B-9-A and 1-B-10-B  
of Land Court Application 601

(As shown on Map 6, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=41,381 Square Feet

(See 14th Naval District Drawing No. OA-N1-1468)

## Waikai Avenue

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

City And County Of Honolulu—(Owner)

Being Lots 360, 361 and 1-B-14-B of  
Land Court Application 601

(As shown on Maps 6 and 7, filed in the Office of  
the Bureau of Conveyances at  
Honolulu, Oahu, T. H.)

Exhibit D—(Continued)

Total Area=36,771 Square Feet  
(See 14th Naval District Drawing  
No. OA-N1-1468)

Being A Portion Of Beryl Street  
Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

City And County Of Honolulu—(Owner)  
Being Lots 1-B-2-B and 2-A-2, as shown on Map 5  
and Beryl Street as shown on Map 3 and Lot B  
(portion of Farm Street), as shown on Map 8  
of Land Court Application 601

(The above mentioned maps referred to by numbers  
are filed in the Office of the Bureau of  
Conveyances at Honolulu, Oahu, T. H.)

Total Area=48,800 Square Feet  
(See 14th Naval District Drawing No. OA-N1-1468)

Jean Street

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

United Investment Company, Limited—(Owner)  
(As shown on Map 3 of Land Court Application  
601, filed in the Office of the Bureau of  
Conveyances at Honolulu, Oahu, T. H.)

Total Area=40,000 Square Feet  
(See 14th Naval District Drawing No. OA-N1-1468)

Being a portion of Palm Avenue  
Situated at Waimano, Ewa, Oahu, T. H.  
Territory Of Hawaii—(Owner)

## Exhibit D—(Continued)

Being portions of R.P. 4475, L.C.Aw. 7713,  
Apana 47 to V. Kamamalu and Grant 8371  
to M. Elnora Sturgeon

(See 14th Naval District Drawing No. OA-N1-1468)

Beginning at the Southeast corner of this parcel of land, being also the Northeast corner of Block 43 of the Pearl City Peninsula Lots (Tracts S-85 of Perimeter Acquisition) and the Northwest corner of Kirkbride Avenue, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 1815.07 feet North and 1826.63 feet East, and thence running by azimuths measured clockwise from True South:

1.  $77^{\circ} 24'$  360.00 feet along the North side of Block 43 of the Pearl City Peninsula (Tract S-85 of Perimeter Acquisition);
2.  $167^{\circ} 24'$  62.00 feet along the East side of Lehua Avenue;
3.  $257^{\circ} 24'$  360.00 feet along the remainders of R.P. 4475, L.C.Aw. 7713 to V. Kamamalu (Tracts S-82, S-83 and S-84 and a portion of Q-1 of Perimeter Acquisition) and Grant 8371 to M. Elnora Sturgeon (Portions of Tracts Q-1 and Q-2 of Perimeter Acquisition);
4.  $347^{\circ} 24'$  62.00 feet across Palm Avenue to the point of beginning and containing an area of 22,320 Square Feet.

Exhibit D—(Continued)

Ashley Avenue

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Territory Of Hawaii—(Owner)

Being portions of L.P. 8168, L.C.Aw. 8305,  
Apana 2 to P. Kanoa and R.P. 4475,

L.C.Aw. 7713, Apana 47 to V. Kamamalu

(See 14th Naval District Drawing No. OA-N1-1468)

Part 1.

Beginning at the Southeast corner of this parcel of land, being also the Northeast corner of Block 40 of the Pearl City Peninsula Lots (Tract V-22 of Perimeter Acquisition), the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 1151.45 feet North and 1974.97 feet East, and thence running by azimuths measured clockwise from True South:

1. 77° 24' 360.00 feet along the North side of Block 40 of the Pearl City Peninsula Lots (Tracts V-22, V-21, V-20, V-19 and V-18 of Perimeter Acquisition);

2. 167° 24' 80.00 feet along the East side of Lehua Avenue;

3. 257° 24' 360.00 feet along the Southside of Block 43 of the Pearl City Peninsula Lots (Tracts S-97, S-98 and S-99 of Perimeter Acquisition);

## Exhibit D—(Continued)

4.  $347^{\circ} 24'$  80.00 feet along the West side of Kirkbride Avenue to the point of beginning and containing an area of 28,800 Square Feet.

## Part 2.

Beginning at the Southeast corner of this parcel of land, being also the Northeast corner of Block 39 of the Pearl City Peninsula Lots (Tract V-6 of Perimeter Acquisition) the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 1051.10 feet North and 1526.05 feet East, and thence running by azimuths measured clockwise from True South:

1.  $77^{\circ} 24'$  1142.60 feet along the North side of Block 39 of the Pearl City Peninsula Lots (Tracts V-6, V-5 and V-4 of Perimeter Acquisition), Lowella Avenue, Block 38 of the Pearl City Peninsula Lots (Tracts V-1 of Perimeter Acquisition), Robinson Avenue, Block 37 of the Pearl City Peninsula Lots (Tracts U-1 and U-9 of Perimeter Acquisition) and Laniwai Avenue;

2.  $167^{\circ} 24'$  80.00 feet along the East side of Block 36 of the Pearl City Peninsula Lots (Tracts U-29 of Perimeter Acquisition) and along land owned by the Oahu Railway and Land Company (Tract R-48 of Perimeter Acquisition);

Exhibit D—(Continued)

3. 257° 24' 1142.00 feet along South side of Land Court Application 601 (Tracts R-43, R-44, R-45 and R-46 of Perimeter Acquisition, and along Tracts S-14, S-15, S-16 and S-17, Beryl Street, Tracts S-48, S-49 and S-50, Jean Street and Tracts S-79 and S-80 of Perimeter Acquisition) ;

4. 347° 24' 80.00 feet along the West side of Lehua Avenue to the point of beginning and containing an area of 91,408 Square Feet.

Being A Portion Of Ilima Drive

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Francis Evans and wife Mary C.—J/T—(Owners)

Being Lot 108-B of Land Court Consolidation 16

(As shown on Map 3, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=22,776 Square Feet

(See 14th Naval District Drawing No. OA-N1-1125)

Pikake Way, Loke Way, Melia Way And A

Portion Of Ilima Drive

Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Oahu Beach and Country Homes, Limited—  
(Owner)

Pikake Way

Being Lot 105 of Land Court Consolidation 16

(As shown on Map 1, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

## Exhibit D—(Continued)

Total Area=28,906 Square Feet

(See 14th Naval District Drawing No. OA-N1-894)

## Loke Way

Being Lot 106 of Land Court Consolidation 16

(As shown on Map 1, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=19,813 Square Feet

(See 14th Naval District Drawing No. OA-N1-894)

## Melia Way

Being Lot 107 of Land Court Consolidation 16

(As shown on Map 1, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=44,704 Square Feet

(See 14th Naval District Drawing No. OA-N1-894)

## Portion Of Ilima Drive

Being Lot 108-A of Land Court Consolidation 16

(As shown on Map 3, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area=50,385 Square Feet

(See 14th Naval District Drawing No. OA-N1-894)

April 25, 1946.

WRIGHT, HARVEY &  
WRIGHT,

[Seal] By /s/ FRED E. HARVEY,

Registered Surveyor Certifi-  
cate 79-ES.

[Endorsed]: Filed May 31, 1946.



[Title of District Court and Cause.]

APPEARANCE

Comes now Arthur H. Spitzer, Esq., Deputy City and County Attorney, and files an appearance to the amended petition in behalf of the City and County of Honolulu, one of the defendants named in the above entitled cause.

Dated at Honolulu, T. H. this 6th day of June, A.D. 1946.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ ARTHUR H. SPITZER,

Deputy City and County At-  
torney.

[Endorsed]: Filed June 6, 1946.

[Title of District Court and Cause.]

ANSWER OF THE CITY AND COUNTY  
OF HONOLULU

Comes now the City and County of Honolulu, a municipal corporation of the Territory of Hawaii, one of the respondents above named by Arthur H. Spitzer, Esq., Deputy City and County Attorney and by way of answer to the Amended Petition of Petitioner admits and alleges as follows, to-wit:

I.

That it admits the allegations contained in Paragraphs I and II of Petitioner's Amended Petition.

II.

That it has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs III and IV of Petitioner's Amended Petition and therefore leaves said Petitioner to its proof thereof.

III.

Answering Paragraph IV of said Amended Petition, this Respondent alleges that it is the owner of certain improvements and pavement along and upon the roadways as shown and described in Exhibits "C," "C-1," "C-2," "C-3," "C-4," "C-5" and "C-6" and Exhibits "D," "D-1," "D-2" and "D-3" of Petitioner's Amended Petition as well as two (2) concrete bridges over Kaiapo Canal on Waikai and

Waipuilani Avenues in the Venetian Palms Tract (Exhibit "D-3") which said improvements and pavement herein sought to be condemned have cost the City and County of Honolulu large sums of money for construction, maintenance and repair.

Wherefore this respondent prays that it may have a trial of the issues involved in this cause and that upon such trial it may be adjudged to be the owner of the bridges, improvements and pavement above described and that just and fair compensation be made to it for the taking of said bridges, improvements and pavement owned by it; for all losses or damages sustained by reason of such taking; for its costs and for such other and further relief to which it may be entitled.

Dated at Honolulu, T. H. this 29th day of June, A.D. 1946.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ ARTHUR H. SPITZER,

Deputy City and County  
Attorney.

Territory of Hawaii

City and County of Honolulu—ss.

Arthur H. Spitzer, being first duly sworn on oath deposes and says: That he is the duly appointed, qualified and acting Deputy City and County Attorney of the City and County of Honolulu; that he has read the foregoing Answer, knows the contents thereof and that the matters and things stated

therein are true to the best of his knowledge, information and belief.

/s/ ARTHUR H. SPITZER,

Subscribed and sworn to before me this 29th day of June, A.D. 1946.

[Seal] /s/ EMELIA L. KRAMER,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission Expires June 30, 1949.

[Endorsed]: Filed June 29, 1946.

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[Title of District Court and Cause.]

### DEMAND FOR JURY TRIAL

Comes now The City and County of Honolulu, one of the defendants herein, by Arthur H. Spitzer, Deputy City and County Attorney, its Attorney, and hereby demands a trial by jury in the above entitled cause.

Dated at Honolulu, T. H. this 1st day of July, 1946.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ ARTHUR H. SPITZER,

Deputy City and County  
Attorney.

Its Attorney.

[Endorsed]: Filed July 1, 1946.

[Title of District Court and Cause.]

MOTION FOR ORDER AMENDING PETITION

Comes now the Petitioner, the United States of America, by its attorney, Fred K. Deuel, Special Attorney, Department of Justice, and moves this Court for an order that the Petition for Condemnation in this cause be amended by striking from Paragraph III of said Petition the words, "subject to existing public utility easements and all other public utility rights of any nature whatsoever."

That the reason for said amendment is to enable the United States of America to acquire the full fee simple title in the lands being condemned.

Dated: Honolulu, T. H., this 27th day of March 1947.

UNITED STATES OF  
AMERICA,

By /s/ FRED K. DEUEL,  
Special Attorney.

[Endorsed]: Filed March 27, 1947.

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[Title of District Court and Cause.]

ORDER AMENDING PETITION

Upon motion of the Petitioner, United States of America, appearing by its attorney, Fred K. Deuel, Special Attorney, Department of Justice, it appearing that the Petitioner desires to amend the Petition for condemnation in this cause in order that the full

fee simple title in the lands being condemned may be acquired;

It Is Hereby Ordered that the Petition for Condemnation in this cause be amended by striking from Paragraph III of said Petition the words, "subject to existing public utility easements and all other public utility rights of any nature whatsoever."

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 27 day of March, 1947.

/s/ L. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

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#### UNITED STATES MARSHAL'S RETURN

The within Order Amending Petition was received by me on the 27th day of March, A.D. 1947, and is returned duly executed as follows:

Personal service was made upon the following named persons by handing to and leaving with each of them certified copies of the original Order Amending Petition.

On April 2, 1947, upon John H. Wilson, Honolulu, T. H., Mayor, City and County of Honolulu; Ingram M. Stainback, Honolulu, T. H. Governor, Territory

of Hawaii and Frank L. James, Honolulu, T. H.;

Dated at Honolulu, T. H., this 11th day of April,  
A.D. 1947.

OTTO F. HEINE,

U. S. Marshal, District of  
Hawaii.

By GEORGE E. BRUNO,  
Deputy.

Further service by me of the above process on  
April 10, 1947 by posting a certified copy of the  
above process at a conspicuous place upon the prem-  
ises therein described.

Dated at Honolulu, T. H. this 11th day of April,  
A.D. 1947.

OTTO F. HEINE,

U. S. Marshal, District of  
Hawaii.

By /s/ THOMAS R. CLARK,  
Deputy.

[Endorsed]: Filed March 27, 1947.

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[Title of District Court and Cause.]

### DECLARATION OF TAKING

Whereas, pursuant to the authority of the Acts  
of Congress approved March 27, 1942 (Public Law  
507—77th Congress), December 20, 1944 (Public  
Law 509—78th Congress), June 26, 1943 (Public  
Law 92—78th Congress), and June 22, 1944 (Pub-

lic Law 347—78th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this Declaration of Taking, and by virtue of authority thereof do hereby state that the lands covered by this Declaration of Taking aggregate 32.31 acres, more or less, at Pearl City Peninsula, Oahu, Territory of Hawaii, being more particularly described in Exhibit "A" attached hereto and made a part hereof, and as shown on a map entitled "Index Map Navy's Pearl Harbor Perimeter Acquisition," designated as 14th Naval District Dwg. No. OA-N1-1302, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is a security strip for the protection of Pearl Harbor and the Naval Reservation as authorized by said Acts; and that the estate hereby taken in said lands for the public use aforesaid is a fee simple title.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging is Two Hundred and Two and 00/100 Dollars (\$202.-00), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names of the owners



of said property and improvements thereon which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this Declaration of Taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the Petitioner, by and through the Secretary of the Navy, has caused this Declaration of Taking to be signed in the City of Washington, District of Columbia, this twenty-eighth day of February, 1947.

UNITED STATES OF AMERICA,

By /s/ W. JOHN KENNEY,

Acting Secretary of the Navy.

Schedule "A"

The names of the persons having title to or other interest in the lands described in the within Declaration of Taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon are as follows:

Parcel	Name of Owner	Acres	Estimated Just Compensation
	Territory of Hawaii.....	26.50	\$ 1.00
	City and County of Honolulu.....	3.75	1.00
P-12	Frank L. James.....	.11	100.00
N-50	Frank L. James.....	1.95	100.00
		<u>32.31</u>	<u>\$202.00</u>

## EXHIBIT A

Descriptions of Roads Within the Pearl City Lots  
(Peninsula Section) Situate at Manana and  
Waimano, Ewa, Oahu, T. H.

[See Exhibit C attached to Petition of Con-  
demnation pages 10 to 30 of this record. The  
first portion of this Exhibit (A) is identical.]

\* \* \*

## Exhibit A—(Continued)

Being a portion of Palm Avenue  
Situated at Waimano, Ewa, Oahu, T. H.

Territory of Hawaii—(Owner)

Being portions of R.P. 4475, L.C.Aw. 7713,  
Apana 47 to V. Kamamalu and Grant 8371  
to M. Elnora Sturgeon

(See 14th Naval District Drawing No. OA-N1,1468)

Beginning at the Southeast corner of this parcel  
of land, being also the Northeast corner of Block 43  
of the Pearl City Peninsula Lots (Tract S-85 of  
Perimeter Acquisition) and the Northwest corner  
of Kirkbride Avenue, the co-ordinates of said point  
of beginning referred to Government Survey Tri-  
angulation Station "Banning" being 1815.07 feet  
North and 1826.63 feet East, and thence running  
by azimuths measured clockwise from True South:

1. 77° 24' 360.00 feet along the North side of  
Block 43 of the Pearl City Peninsula Lots (Tract  
S-85 of Perimeter Acquisition);

Exhibit A—(Continued)

2. 167° 24' 62.00 feet along the East side of Lehua Avenue;

3. 257° 24' 360.00 feet along the remainders of R.P. 4475, L.C.Aw. 7713 to V. Kamamalu (Tracts S-82, S-83 and S-84 and a portion of Q-1 of Perimeter Acquisition) and Grant 8371 to M. Elnora Sturgeon (Portions of Tracts Q-1 and Q-2 of Perimeter Acquisition);

4. 347° 24' 62.00 feet across Palm Avenue to the point of beginning and containing an area of 22,320 Square Feet.

Ashley Avenue

Situated at Manananui and Waimano,

Ewa, Oahu, T. H.

Territory of Hawaii—(Owner)

Being portions of L.P. 8168, L.C.Aw. 8305,

Apana 2 to Kanoa and R.P. 4475, L.C.Aw.

7713, Apana 47 to V. Kamamalu

(See 14th Naval District Drawing No. OA-N1-1468)

Part 1.

Beginning at the Southeast corner of this parcel of land, being also the Northeast corner of Block 40 of the Pearl City Peninsula Lots (Tract V-22 of Perimeter Acquisition), the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 1151.45 feet North and 1974.97 feet East, and thence running by azimuths measured clockwise from True South:

## Exhibit A—(Continued)

1. 77° 24' 360.00 feet along the North side of Block 40 of the Pearl City Peninsula Lots (Tracts V-22, V-21, V-20, V-19 and V-18 of Perimeter Acquisition);

2. 167° 24' 80.00 feet along the East side of Lehua Avenue;

3. 257° 24' 360.00 feet along the South side of Block 43 of the Pearl City Peninsula Lots (Tracts S-97, S-98 and S-99 of Perimeter Acquisition);

4. 347° 24' 80.00 feet along the West side of Kirkbride Avenue to the point of beginning and containing an area of 28,800 Square Feet.

## Part 2.

Beginning at the Southeast corner of this parcel of land, being also the Northeast corner of Block 39 of the Pearl City Peninsula Lots (Tract V-6 of Perimeter Acquisition) the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 1051.10 feet North and 1526.05 feet East, and thence running by azimuths measured clockwise from True South:

1. 77° 24' 1142.60 feet along the North side of Block 39 of the Pearl City Peninsula Lots (Tracts V-6, V-5 and V-4 of Perimeter Acquisition), Lowell Avenue, Block 38 of the Pearl City Peninsula Lots (Tracts V-1 of Perimeter Acquisition), Robinson Avenue, Block 37 of the Pearl City Peninsula Lots (Tracts U-1 and U-9 of Perimeter Acquisition) and Laniwai Avenue;

Exhibit A—(Continued)

2. 167° 24' 80.00 feet along the East side of Block 36 of the Pearl City Peninsula Lots (Tract U-29 of Perimeter Acquisition) and along land owned by the Oahu Railway and Land Company (Tract R-48 of Perimeter Acquisition);

3. 257° 24' 1142.60 feet along South side of Land Court Application 601 (Tracts R-43, R-44, R-45 and R-46 of Perimeter Acquisition, and along Tracts S-14, S-15, S-16 and S-17, Beryl Street, Tracts S-48, S-49 and S-50, Jean Street and Tracts S-79 and S-80 of Perimeter Acquisition);

4. 347° 24' 80.00 feet along the West side of Lehua Avenue to the point of beginning and containing an area of 91,408 Square Feet.

Descriptions of Roads Within a Portion of the  
Pearl City Peninsula Situated At Manananui  
and Waimano, Ewa, Oahu, T. H.

Apparent Owner—City & County of Honolulu, T. H.

Being A Portion Of Waipuna Avenue  
Situated at Manananui and Waimano,  
Ewa, Oahu, T. H.

Being Lots 2-B-1 and 2-C-1-A  
of Land Court Application 601

(As shown on Maps 5 and 6, filed in the Office  
of the Bureau of Conveyances at Honolulu,  
Oahu, T. H.)

Total Area—31,114 Square Feet

(See 14th Naval District Drawing No. OA-NI-1468)

## Exhibit A—(Continued)

Being A Portion of Waiauau Avenue  
Situating at Manananui and Waimano,  
Ewa, Oahu, T. H.

Being Lots 1-B-3-A and 390-B of Land Court  
Application 601

(As shown on Maps 6 and 8, filed in the Office  
of the Bureau of Conveyances, at Honolulu,  
Oahu, T. H.)

Total Area—5,201 Square Feet  
(See 14th Naval District Drawing No. OA-NI-1468)

## Waipuiani Avenue

Situating at Manananui and Waimano,  
Ewa, Oahu, T. H.

Being Lots 362, 363, 380, 1-B-9-A and 1-B-10-B  
of Land Court Application 601

(As shown on Map 6, filed in the Office of the  
Bureau of Conveyances at Honolulu, Oahu, T. H.)

Total Area—41,381 Square Feet  
(See 14th Naval District Drawing No. OA-NI-1468)

## Waikai Avenue

Situating at Manananui and Waimano,  
Ewa, Oahu, T. H.

Being Lots 360, 361 and 1-B-14-B of Land Court  
Application 601

(As shown on Maps 6 and 7, filed in the Office  
of the Bureau of Conveyances at Honolulu,  
Oahu, T. H.)

Total Area—36,771 Square Feet  
(See 14th Naval District Drawing No. OA-NI-1468)

Exhibit A—(Continued)

Being A Portion Of Beryl Street

Situated at Manananui and Waimano,

Ewa, Oahu, T. H.

Being Lots 1-B-2-B and 2-A-2, as shown on

Map 5 and Beryl Street as shown on Map 3 and

Lot B (portion of Farm Street), as shown on

Map 8 of Land Court Application 601

(The above-mentioned maps referred to by

numbers are filed in the Office of the Bureau of

Conveyances at Honolulu, Oahu, T. H.)

Total Area—48,800 Square Feet

(See 14th Naval District Drawing No. OA-NI-1468)

Tract 50 Of Portion N

Being Lots 370, 371 and 372 (Waikahe Avenue);

(Lots 343 and 369 (Waieli Avenue); Lots 366, 367,

368 and a portion of Lot 403 (portion of Waipuna

Avenue) of Land Court Application 601

Situated at Manana-Nui, Ewa, Oahu, T. H.

Beginning at the Northeast corner of this tract of land, being also the Northeast corner of Lot 343 and the Southeast corner of Lot 374 (U. S. Navy Tract 1 of Portion N) of Land Court Application 601, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Banning" being 2705.42 feet North and 379.34 feet East, and thence running by azimuths measured clockwise from True South:

1. 333° 22' 345.70 feet along Section 1-B of Land Court Application 945, along U. S. Navy Tract 20 of Portion J;

## Exhibit A—(Continued)

2. 319° 20' 108.10 feet along Section 1-B of Land Court Application 945, along U. S. Navy Tract 20 of Portion J;
3. 68° 48' 5.30 feet along Lot 342 of Land Court Application 601, along U. S. Navy Tract 2 of Portion P;
4. 319° 20' 43.42 feet along Lot 342 of Land Court Application 601, along U. S. Navy Tract 2 of Portion P;
5. 347° 24' 40.00 feet along the remainder of Lot 403 of Land Court Application 601 (remainder of Waipuna Avenue), along U. S. Navy Tract 12 of Portion P;
6. 77° 24' 842.48 feet along Lots 402, 341, 339, 164, 166, 167, 169, 171, 173, 175, 177, 179 and 182 of Land Court Application 601, along U. S. Navy Tracts 47, 38, 37, 36, 34, and 33 of Portion N;
7. 167° 24' 17.50 feet along Lot 181 of Land Court Application 601, along U. S. Navy Tract 32 of Portion N;
8. 77° 24' 141.65 feet along Lot 181 of Land Court Application 601, along U. S. Navy Tract 32 of Portion N;
9. 169° 55' 5.00 feet along the Westerly boundary of Land Court Application 601;
10. 257° 24' 141.43 feet along Lot 143 of Land



Exhibit A—(Continued)

Court Application 601, along U. S. Navy Tract 25 of Portion N;

11. 167° 24' 17.50 feet along Lot 143 of Land Court Application 601, along U. S. Navy Tract 25 of Portion N;

12. 257° 24' 797.15 feet along Lots 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 163, 345 and 344 of Land Court Application 601, along U. S. Navy Tracts 25, 26, 27, 28, 29, 30, 31 and 24 of Portion N;

13. 139° 20' 133.96 feet along Lots 344, 346 and 348 of Land Court Application 601, along U. S. Navy Tracts 24 and 23 of Portion N;

14. 153° 22' 159.16 feet along Lots 348, 350 and 352 of Land Court Application 601, along U. S. Navy Tracts 23, 22 and 21 of Portion N;

15. 77° 24' 694.73 feet along Lots 352, 353, 120, 121, 122, 124, 126, 128, 130, 132, 134, 136 and 139 of Land Court Application 601, along U. S. Navy Tracts 21, 20, 19, 18, 17, 16, 15 and 14 of Portion N;

16. 167° 24' 17.50 feet along Lot 138 of Land Court Application 601, along U. S. Navy Tract 13 of Portion N;

17. 77° 24' 121.84 feet along Lot 138 of Land Court Application 601, along U. S. Navy Tract 13 of Portion N;

## Exhibit A—(Continued)

18.  $182^{\circ} 41'$  5.18 feet along the Westerly boundary of Land Court Application 601;

19.  $257^{\circ} 24'$  120.48 feet along Lot 101 of Land Court Application 601, along U. S. Navy Tract 2 of Portion N;

20.  $167^{\circ} 24'$  17.50 feet along Lot 101 of Land Court Application 601, along U. S. Navy Tract 2 of Portion N;

21.  $257^{\circ} 24'$  531.26 feet along Lots 102, 104, 106, 108, 110, 112, 114, 116, 118, 119, 355 and 354 of Land Court Application 601, along U. S. Navy Tracts 2, 3, 4, 5, 6, 7, 8, 9 and 12 of Portion N;

22.  $153^{\circ} 22'$  162.10 feet along Lots 354, 356 and 358 of Land Court Application 601, along U. S. Navy Tracts 12, 11 and 10 of Portion N;

23.  $257^{\circ} 24'$  46.38 feet along Lot 374 of Land Court Application 601, along U. S. Navy Tract 1 of Portion N to the point of beginning and containing an area of 84,760 square feet.

## Tract 12 of Portion P

Being a portion of Lot 403 (portion of Waipuna Avenue) of Land Court Application 601

Situated at Manana-Nui, Ewa, Oahu, T. H.

Beginning at the Northwest corner of this tract of land being also the Southwest corner of Lot 342 (U. S. Navy Tract 2 of Portion P), of Land Court Application 601 the co-ordinates of said point of

Exhibit A—(Continued)

beginning referred to Government Survey Triangulation Station "Banning" being 2279.56 feet North and 628.11 feet East, and thence running by azimuths measured clockwise from True South:

1.  $257^{\circ} 24'$  128.60 feet along Lot 342 of Land Court Application 601, along U. S. Navy Tract 2 of Portion P;

2.  $342^{\circ} 46'$  40.13 feet along Lot 2-C-1-A of Land Court Application 601, along the remainder of Waipuna Avenue;

3.  $77^{\circ} 24'$  131.84 feet along Lots 400 and 402 of Land Court Application 601, along U. S. Navy Tract 3 of Portion P, and U. S. Navy Tract 47 of Portion N;

4.  $167^{\circ} 24'$  40.00 feet along the remainder of Lot 403 of Land Court Application 601 (remainder of Waipuna Avenue), along U. S. Navy Tract 50 of Portion N to the point of beginning and containing an area of 5209 Square Feet.

[Endorsed]: Filed March 31, 1947.

[Title of District Court and Cause.]

ORDER AND JUDGMENT ON  
DECLARATION OF TAKING

It appearing that on the 8th day of January, 1946, the United States of America filed a Petition for Condemnation of certain lands described and shown on the Exhibits attached to said Petition, that on the 31st day of March, 1946, an Order of this Court was entered amending said Petition for Condemnation by adding thereto certain additional lands, and that on the 27th day of March, 1947, an Order of this Court was entered, further amending said Petition for Condemnation in so far as the estate to be acquired is concerned, and

It further appearing that a Declaration of Taking was filed on the 31st day of March, 1947, signed by W. John Kenney, Acting Secretary of the Navy, declaring taken the lands described in said Declaration of Taking to the extent shown in said Declaration of Taking and in the Exhibits attached thereto as Exhibits "A" and "B"; that the uses of said lands are those described in the Declaration of Taking and in the Petition filed herein as amended, and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law, and that contemporaneously with the filing of said Declaration of Taking there was deposited in the registry of this Court for the use of the persons entitled thereto the sum of Two Hundred Two and No/100 Dollars (\$202.00).

It Is Therefore Ordered, Adjudged And Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, that the full fee simple title to said lands described in Exhibits "A" and "B" attached to the said Declaration of Taking, be and the same is hereby indefeasibly vested in the United States of America.

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 31st day of March, 1947.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

#### UNITED STATES MARSHAL'S RETURN

The within Order Amending Petition and Order And Judgment On Declaration Of Taking was received by me on the 16th day of April, A.D. 1947, and is returned duly executed as follows:

Personal service was made upon the following named persons by handing to and leaving with each of them certified copies of the original Order Amending Petition and Order and Judgment on Declaration of Taking.

On April 22, 1947, upon Ingram M. Stainback,

Honolulu, T.H., Governor, Territory of Hawaii; John H. Wilson, Honolulu, T.H., Mayor, City and County of Honolulu; Frank L. James, Honolulu, T.H.;

On June 5, 1947, by posting certified copies of the above processes at a conspicuous place upon the premises at Pearl City Peninsula, Oahu, T.H.

Dated at Honolulu, T.H. this 6th day of June, A.D. 1947.

OTTO F. HEINE,

U. S. Marshal District of  
Hawaii.

By /s/ EMMANUEL U. MOSES, Jr.,  
Deputy.

[Endorsed]: Filed April 1, 1947.

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[Title of District Court and Cause.]

### STIPULATION

This cause coming on to be heard this 24th day of March before the Honorable Judge Frank J. McLaughlin and upon the joint motion of the United States of America, Petitioner, the Territory of Hawaii and The City and County of Honolulu, Defendants, through their respective attorneys of record,

It Is Hereby Stipulated by and between the United States of America, Territory of Hawaii and The City and County of Honolulu that the City and

County of Honolulu having the beneficial interest in and to the fee and the improvements of the roads, streets and highways in the Pearl City Peninsula, which roads, streets and highways are included in and the subject of these proceedings entitled "Civil No. 695—United States of America, vs. 34.03 Acres of land, more or less, located at Pearl City Peninsula, Oahu, Territory of Hawaii, City and County of Honolulu; Territory of Hawaii; Frank L. James, et al.," and pending in the District Court of the United States for the District of Hawaii, that for the purposes of said condemnation proceedings, heretofore designated, The City and County of Honolulu shall be deemed to be the owner not only of the beneficial interest in and to the fee and the improvements of said roads, streets and highways, but also the legal owner of the fee and the improvements of said roads, streets and highways and the Territory of Hawaii hereby waives, in favor of The City and County of Honolulu, any right the Territory of Hawaii may have to compensation for the taking of said roads, streets and highways.

It is understood that in joining in this stipulation the United States of America is neither admitting any liability herein nor is it acknowledging or denying title in or to the roads, streets and highways and improvements thereon but is joining herein for the sole purpose of recognizing the agreement between the City and County of Honolulu and the

Territory of Hawaii regarding their respective interests herein.

UNITED STATES OF  
AMERICA,

By /s/ FRED K. DEUEL,  
Special Attorney Department  
of Justice.

TERRITORY OF HAWAII,

By /s/ WALTER D. ACKERMAN, JR.,  
Attorney General.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ WILFRED D. GODBOLD,  
City and County Attorney.

[Endorsed]: Filed March 24, 1948.

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From the Minutes of the United States District  
Court for the District of Hawaii  
Monday, July 11, 1949

[Title of Court and Cause]

On this day at 9 a.m., came Mr. Harry T. Dolan, Special Assistant to the Attorney General of the United States, no defendants being present or represented by counsel. This case was called for trial on the claims of the City and County of Honolulu and the Territory of Hawaii.

Order of Default was ordered against the City and County of Honolulu and the Territory of Hawaii.



Motion to fix the fair value and just compensation for the taking of all streets and highways herein was made by Mr. Dolan, and was granted by the Court in the sum of \$1.00. Order to that effect to be signed upon presentation.

At 9:30 a.m., Mr. Frank A. McKinley, Deputy City and County Attorney, appeared before the Court and requested to be heard.

The request was granted and the order of default as to the City and County of Honolulu and the Territory of Hawaii was set aside by the Court.

Folowing argument by respective counsel on the claim of the City and County of Honolulu, at 10:10 a.m., Mr. Francis H. Kanahele, Public Lands Executive Officer, Territory of Hawaii, was called and sworn and testified on behalf of the City and County of Honolulu.

At 10:36 a.m., upon the evidence adduced, the Court ruled that in point of law, the Territory of Hawaii was entitled to a nominal value of \$1.00. Exceptions to the court's ruling were noted by the defendant.

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[Title of District Court and Cause.]

## NOTICE OF SETTLEMENT OF ORDER

To: The Attorney General Territory of Hawaii  
Iolani Palace Honolulu, T. H. City and County  
Attorney City and County of Honolulu City  
Hall, Honolulu, T. H.

Please take notice that there is attached hereto

a proposed order fixing the fair value and just compensation which should be paid for the taking of all streets and highways within Pearl City Peninsula in the above-entitled proceeding, which will be presented for settlement and signature before the Honorable J. Frank McLaughlin, United States District Judge for the above-entitled District, in chambers on the 19th of July, 1949, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

Dated: Honolulu, T. H., this 12th day of July, 1949.

/s/ HARRY T. DOLAN,

Special Assistant to the At-  
torney General.

[Endorsed]: Filed July 12, 1949.

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[Title of District Court and Cause.]

### ORDER FIXING JUST COMPENSATION

This cause having come on to be heard before this court on July 11, 1949, pursuant to notice of trial dated May 27, 1949, for the purpose of fixing and determining the just compensation which should be paid by petitioner, United States of America, for the taking of all streets and highways within Pearl City Peninsula in the above-entitled proceeding, and the City and County of Honolulu having appeared by Frank A. McKinley, Assistant City and County Attorney, and the Territory of Hawaii not

appearing, and petitioner, United States of America, having appeared by Harry T. Dolan, Special Assistant to the Attorney General, and the court after hearing argument of counsel in connection with the claims of the City and County of Honolulu to substantial compensation and the right to offer proof concerning the theories advanced, and the court having concluded that based upon the great weight of authority and established law that the City and County of Honolulu and the Territory of Hawaii were not entitled to more than nominal damages for the taking of said streets and highways, in the absence of any necessity to create or provide substitute facilities,

Now Therefore, It Is Hereby Ordered, Adjudged And Decreed:

(1) That the fair value and just compensation which should be paid by petitioner, United States of America, to the Territory of Hawaii and the City and County of Honolulu for the taking of the fee title to said streets and highways in the above-entitled proceeding and as described in the petition for condemnation and declaration of taking filed herein, is fixed and determined to be the sum of One Dollar (\$1.00).

(2) That said sum of One Dollar (\$1.00) which was heretofore deposited by petitioner in the registry of this court, may be withdrawn by said Territory of Hawaii or said City and County of

Honolulu, upon proper application therefor and in accordance with rules of this court.

Dated: Honolulu, T. H., this 20 day of July, 1949.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

Subject to exception to Court's ruling reserved  
by City and County of Honolulu by Atty. McKin-  
ley.

/s/ J. F. Mc

7-20-49

[Endorsed]: Filed July 20, 1949.

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Territory of Hawaii,  
City and County of Honolulu—ss.

I. Francis H. Kanahele, being first duly sworn,  
depose and state:

That on the 11th day of July 1949, I appeared as  
a witness and gave testimony before the Honorable  
J. Frank McLaughlin, Judge of the United States  
District Court for the Territory of Hawaii, in Civil  
No. 695, being proceedings entitled United States of  
America vs. 34.03 acres of land et al., Defendant;

That in the Transcript Of Proceedings in said  
case, at the bottom of page 37 and the top of page  
38 in said Transcript, appear the following ques-  
tions and answers:

“Q. And you will furnish us with the details,

maps, showing where the areas were, when they were abandoned, the type of property and all the details?

A. We have those records, except that I'd like to correct one word in your statement. The fee is not substantial.

The Court: No, he said where under those circumstances the government either provided an access or substitute road or paid substantial damages to the abutting owners of the abandoned road.

The Witness: That's right. But when we sold those parcels they were not at a substantial price.”;

That the foregoing are the questions put to me when I was on the witness stand and the answers I gave thereto; that the use of the word “substantial” as contained in my answers is incorrect; that the true and correct answers that I should have given to the questions previously recited were:

A. We have those records, except that I'd like to correct one word in your statement. The fee is not at the market value.

\* \* \*

The Witness: That's right. But when we sold those parcels they were not at the market value.;

That I inadvertently used the word “substantial” instead of the phrase “market value”; that the reason for such inadvertence is as follows:

It has long been the practice of the Commissioner of Public Lands in disposing of lands which were formerly encumbered for road purposes, to offer said vacated parcels to the abutting owners at a figure substantially below the market value; the measure of value used by the Commissioner of Pub-

lic Lands in disposing of vacated road parcels to abutting owners is the fair value of the parcel. This practice can best be explained by the use of the following example:

Should the vacated parcel to be disposed of have a 100' frontage and a 10' depth and should the abutting property as well as the property in the immediate neighborhood have an average value of \$1.00 per square foot, the vacated parcel would be offered to the abutting owner at a value of approximately 50c per square foot, or a total consideration of \$500.00 for the 1000 square feet;

That I make this affidavit for the purpose of correcting an inadvertence in my testimony which appears at the bottom of Page 37 and the top of page 38 in the Transcript Of Proceedings in said Civil No. 695; that if given the opportunity to testify again, I would recite the facts as they appear in this affidavit.

/s/ FRANCIS H. KANAHELE.

Subscribed and sworn to before me this 2nd day of September, 1949.

[Seal] /s/ WM. L. EWALIKO,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission Expires June 30, 1953.  
No objection.

/s/ FRED K. DEUEL,  
Special Attorney Dept. of  
Justice.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the City and County of Honolulu hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that portion of the final Judgment of this Court entered in this action on July 20, 1949, determining the fair value and just compensation to be the sum of One Dollar (\$1.00) which should be paid by Petitioner, United States of America, to the Territory of Hawaii and the City and County of Honolulu for the Taking of the fee title to the streets and highways as described in the petition for Condemnation and Declaration of Taking herein.

Dated: Honolulu, T. H., this 14th day of September, 1949.

THE CITY AND COUNTY OF  
HONOLULU,

By /s/ FRANK A. McKINLEY,  
Deputy City and County  
Attorney.

[Endorsed]: Filed September 14, 1949.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That City And County Of Honolulu, a municipal corporation of the Territory of Hawaii, as principal, and United States Fidelity And Guaranty Com-

pany, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto United States of America, Petitioner, in the sum of \$250.00 for the payment of which well and truly to be made, said City and County of Honolulu, as principal, and United States Fidelity and Guaranty Company, as surety, do bind themselves, their respective successors and assigns, jointly and severally, and firmly by these presents.

The Condition Of This Obligation Is Such That:

Whereas the above bounden principal, City and County of Honolulu, has filed its notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order Fixing Just Compensation entered in the above-entitled cause;

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if it fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

Dated: Honolulu, T. H. this 9th day of September, 1949.

CITY AND COUNTY OF  
HONOLULU,

[Seal] By /s/ JOHN H. WILSON,  
Mayor.

By /s/ LEON K. STERLING, SR.,  
Clerk.



Principal.  
UNITED STATES FIDELITY  
AND GUARANTY  
COMPANY,

[Seal] By /s/ CALVERT G. CHIPCHASE,  
Its Attorney-in-Fact,  
Surety.

Territory of Hawaii,  
City and County of Honolulu—ss.

On this 14th day of September, 1949, before me appeared John H. Wilson and Leon K. Sterling, Sr., to me personally known, who being by me duly sworn did say:

That they are the Mayor and Clerk respectively, of the City and County of Honolulu, a municipal corporation of the Territory of Hawaii; that the seal affixed to the foregoing instrument is the corporate seal of said City and County of Honolulu; that said instrument was signed and sealed in behalf of said City and County of Honolulu by authority of its Board of Supervisors; that the said John H. Wilson and Leon K. Sterling, Sr. acknowledged the said instrument to be the free act and deed of said City and County of Honolulu.

[Seal] /s/ EMELIA L. KRAMER,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires June 30, 1953.

[Endorsed]: Filed September 14, 1949.

In the United States District Court for the  
Territory of Hawaii  
Civil No. 695

UNITED STATES OF AMERICA,  
Petitioner,  
vs.

34.04 ACRES OF LAND, more or less, located at  
PEARL CITY PENINSULA, OAHU, TER-  
RITORY OF HAWAII, CITY AND  
COUNTY OF HONOLULU; TERRITORY  
OF HAWAII; FRANK L. JAMES, ET AL.,  
Defendants.

### TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. Dis-  
trict Court, Honolulu, T. H., on July 11, 1949,  
at 9:00 a.m.

Before Hon. J. Frank McLaughlin,  
Judge.

#### Appearances:

HARRY T. DOLAN, Esq.,  
Assistant to the Attorney General, appear-  
ing for the Petitioner;

FRANK A. McKINLEY, Esq.,  
Deputy City and County Attorney, Hono-  
lulu, T. H., appearing for the City and  
County of Honolulu.

The Clerk: Civil No. 695, United States of  
America versus 34.03 acres of land. This also was  
called for trial.

Mr. Dolan: Your Honor, this is the tail end of the Pearl City Peninsula case. What I am trying to do is to get some of these files completely closed, even though the matters are of relatively small importance; even though there is something small, the file remains open. And even though the case was for trial, for the purpose of having the Court fix a nominal value for the areas within public streets and highways located within the perimeter of the Pearl City Peninsula, the title to which, the bed of the streets, remaining in the Territory and the beneficial use, management and control being, I believe, in the City and County. The Territory of Hawaii and the City and County of Honolulu were both joined as defendants in the previous setting of this case and notified of the adjournment date to today.

When it was originally set for trial, originally noticed for trial, a representative of the City and County came over and said that the man who was handling it was away on vacation.

The Court: Oh, yes, I remember.

Mr. Dolan: He was back here, I think, the last time this was called, a week or so ago. He said he wanted to look into it a little further and study it. He called Mr. Deuel some time later in the week and told him that he thought that [2\*] the Court had no jurisdiction due to the fact that the title in the beds of those streets and highways was already in the United States Government in the sense that it

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\* Page numbering appearing at top of page of original Reporter's Transcript.

was land that had been ceded to the United States and therefore we already owned it. Of course, we don't agree with that contention because this land within the beds of the streets was not a part of the land publicly ceded to the United States.

Now, strangely enough, I find in the file a stipulation dated the 24th day of March of this year in which the Government joined in a stipulation prepared by the City and County Attorney, signed by the City and County Attorney and the Territorial Attorney General, Walter D. Ackerman, and the purpose of which stipulation was to have an agreement between the Territory and the City and County of Honolulu that for the purpose of this condemnation the Territory would waive any right to title, to any claim for compensation in favor of the County. So we joined in that stipulation without conceding any liability or denying the title to be in either one.

Now, we contend, of course, that it is academic and elementary that regardless of where the title is, whether it is in the City and County, that the compensation can only be nominal in the absence of any necessity to substitute other streets or public ways for these takings. And we know it to be a fact that none of these streets had to be relocated or substitution facilities created. And in the absence of such necessity the courts are unanimous in holding in many recent cases, some of which I tried and which have gone to the circuit courts, that the compensation has to be nominal.

The Court: No question about it.

Mr. Dolan: So I ask your Honor, in the absence of any appearance on the part of the Territory or the City and County today, or any offer of proof that substitute facilities were required, to fix the compensation for the street areas at the nominal sum of one dollar.

The Court: So ordered. You can prepare an order to that effect and I will sign it.

Mr. Dolan: I might call your Honor's attention to the fact, as your Honor already knows, that all of the streets and the public ways within that perimeter were taken except the main street which runs right down the center of the peninsula. That was left.

(A recess was taken at this point.)

#### After Recess

The Clerk: Civil No. 695, United States of America versus 34.03 acres of land.

The Court: In this particular case a few moments ago I entered a default order against the City and County and the Territory. Mr. McKinley has arrived in the meantime stating that this case having been set in his absence, he [4] having been away on vacation, he thought it was at ten o'clock instead of nine. So it would be best to resume consideration of the case, and I will set aside the order heretofore made this morning so you can be heard. Mr. McKinley.

Mr. McKinley: If the Court please, I wish to make a public apology for not being here.

The Court: We all make mistakes.

Mr. McKinley: If the Court please, on the 20th day of March, 1948, a stipulation was entered into by and between the Territory of Hawaii and the City and County on the one hand and the United States Government on the other, whereby it was agreed in substance that the Territory would waive its interest to any compensation in favor of the City and County and that the City and County be deemed to have not only the beneficial interest of the roads and highways located in Pearl City Peninsula but also the legal owner for the purpose of being entitled to any compensation.

With reference to the question of compensation, I wish to state that I am very familiar with the long line of cases and recent line of decisions coming down from the Circuit Court of Appeals, and in many instances where certiorari was denied, and the most recent of those, as I understand, was the United States Government against the State of California. And I do feel that there is a substantial weight of existing decisions against our position, but I have this point in mind [5] and that is the rule enunciated in those cases, that it must be treated only as a generality for the reason that where the economic utilization of land is confined to a use of the land surface, then in the absence of or rather in the presence of a fee being encumbered with an easement in the public for road purposes that easement, if it remains in perpetuity, so obstructs any economic utilization of that fee as to

render the ownership of the fee or the easement of a negative quantity, and therefore it is nominal only. But that being the rule, I think that we have to appreciate it only as a general rule for the reason that were we to assume that there were valuable mineral rights located beneath that surface, or valuable air rights located above the surface, then the condemnation of the fee must take the rest of the assets, economic assets located in that fee, and that would be compensable according to my understanding of due compensation.

Now, then, coming more directly to the point, I quite agree with counsel and I quite agree with the line of cases that the municipality or the state is entitled only to nominal compensation where you have an unencumbered fee and in the absence of other mineral rights or air rights. But let us draw this analogy: Supposing we have a fee that is encumbered by a lease for 99 years, or even a greater term, whereby the rental of that lease is nominal; let us say it would be one dollar a year. Now, that would in substance [6] destroy the economic utilization of that land because the owner of the fee is entitled only to the rental of the lease. But let us change that principle a little bit and say that the fee is encumbered with a lease that is of month to month duration and that lease rental is a nominal one. We must assume, then, that the grantor having the power to disencumber this fee creates then a full and complete title and, as such, is subject to utilization; and we must then determine what is the

highest and best use, and, secondly, what if any market value lies in this use.

Now, I have instructed my witness, the executive officer for the Commissioner of Public Lands, Mr. Francis Kanahele, to come here at ten o'clock, and he is prepared to show that title to these lands lies in the Territory. And he is prepared to show also that on a substantial number of instances the City and County or the Territory has disencumbered this fee where it has been subjected to an easement in the public for road purposes. And with that you have an automatic vesting of this land in the public land pool, let us say, a land pool of the Territory. And as such, the Commissioner of Public Lands is empowered to transfer this disencumbered fee out, and on a substantial number of instances he has transferred this fee out, either for the receipt of money or in exchange of other valuable land.

Now, my point is that the City and County by resolution [7] can vacate these roads, and as such, the fee is disencumbered and the Commissioner of Public Lands can then transfer this land out and it is a free and unencumbered title so far as I know. I think that has been accepted by all the abstractors, too. That is in substance our position.

And I wish to state that I have read those previous decisions, that is, the Circuit Court of Appeals decisions, very carefully with that thought in mind, and not once have the courts therein indicated that that fact, that the owner of the land is in a po-



sition to disencumber the land, that that fact was ever considered by any of these courts, and for that reason I wish to present it to your Honor.

The Court: Well, it is an interesting and rather novel position. Can we not for argumentative purposes assume that what you have said can be substantiated?

Mr. McKinley: I think your Honor can safely do that, because I of my personal knowledge have participated in transactions, exchanges of lands that have been formerly encumbered for land purposes, and we have realized substantial sums of money therefrom.

Mr. Dolan: There is not a case that has been decided that has gone to the circuit courts, decided by the district courts, in which this same theoretical situation that he presents wasn't present or couldn't have been possible. In other words, all public streets or public highways under certain circumstances may be abandoned for public use. But here is a situation where on the date of taking there was no abandonment that had taken place. Everybody in those developments who bought land, came within that area, had the right to use those streets for purposes of ingress and egress. And it is very questionable in my mind under the circumstances whereby a municipality or county or territory or anybody who own the fee title, subject to such servitude, can declare an abandonment of such streets without paying just compensation to the owners of the abutted land. In other words, if land ceases to have any use

as a public street, and there is no occasion or necessity for a street, of course it can be abandoned and closed up. But you have to go through a regular proceeding, an abandonment proceeding in it.

In the City of New York and all cities with which I am familiar, the city just can't come out and take a heavily travelled street in a residential or business or an industrial community, and just because they want to get the fee title back to them so they could maybe sell it to the adjoining property owners to expand an industrial plant deny everybody else the depreciation in value of their property resulting from the closing of that street. And I question it very seriously. Take King Street. If it applies to Pearl City it applies here. Do you mean to say that the City or the Territory or the County could come down here to King Street [9] or Fort Street or Merchant Street and just arbitrarily close up one of those main thoroughfares in order to get the title back into the Territory free from the public servitude and then dispose of the land on the market without paying the abutting owners damages for the closing of that street? I don't believe that that makes sense.

Now, we are valuing this property on the date of taking. On the date of taking these were public streets. There had been no effort made, no possibility, not the remotest thought on anyone's part that the situation might ever develop in the future where these streets might become abandoned. It was a highly developed area. The streets were be-

ing used as public streets. They were beneficial servitude easements in favor of all the people in that area, not only the people in that area but the areas adjoining, as a means of getting into this particular area. Now, we are to value the property as of the date of taking, not at some remote time in the future when some circumstance might develop whereby the abandonment of those public highways might become a practical matter.

Now, there isn't a case that I can think of—and I have tried some of them myself in the circuit court—in which this same theoretical situation might not exist. As a matter of fact, in the last case I tried in the Second Circuit, in which all of these cases were reviewed of other circuits, [10] the lands in the bed of the streets were technically not public streets. They were public marketways, so-called in New York City. They were in an area in which all of the land within this development called "Wall About Market" was owned by the City of New York. They owned about 53 acres of land in fee. They subdivided it into blocks and lots and leased out those blocks and lots to private individuals, corporations, for the purpose of erecting and constructing various commercial properties, each one of those people paying the City of New York a long term lease.

Now, in order to make that area suitable for that sort of use and development to produce that type of income, they had to set aside a certain part of the area for means of access to those various commercial

properties built within those blocks so subdivided. But at no time did the City of New York ever dedicate those marketways to those methods, means of transportation, as public streets. The title to the fee had always remained in the City of New York. On a map filed by the city for the purpose of their own development they laid them out as streets. There was no public dedication of the land as streets. The City of New York tried to make the distinction, in the case that I tried, that due to the fact there had been no public dedication of these areas or the lands within these, in the beds of these so-called streets, no public dedication had been made of them as streets, [11] that a different rule should apply, because they at any time from the expiration of their leases might decide to use it for an entirely different use, in which they could have these buildings torn down and rearrange the development and utilize the land in the bed of the streets.

But we contended that those streets had been opened and used by the public for years, not only as a means of travelling in and around and about this particular development but as a means of the public getting through this area to other areas contiguous and adjacent to it. And the court there made no distinction between that and any other public street, open to the public and being used for street purposes.

The Court: That is a circuit court decision?

Mr. Dolan: That went to the Circuit Court of Appeals in the Second Circuit.

The Court: They made no distinction?

Mr. Dolan: They called them marketways, not streets. And there had been no public dedication of those streets for street purposes. But nevertheless since 1895, since that time, they had been used for street purposes, not only by the people in the development but by people who were passing from the Brooklyn area up through the Williamsburg area and had to pass it. It was the most convenient way to get there, the shortest route to pass through this "Wall About Market" section. [12]

The Court: They just gave it a nominal value and the circuit court affirmed it?

Mr. Dolan: Not only for the value of the land within the street area but also for the pavements and curbs and gutters, for the water system, sewer system—all took the nominal value because they applied the same rule which had been consistently applied that such land, the substantial value of such improvements, was paid for by the Federal Government when they condemned the lots and the property lying adjacent thereto. In other words, we won't pay the same compensation in Pearl City Peninsula for these various lots and parcels of land lying adjacent to these streets and having street access as we would if they were out in the middle of the interior without any road access. The compensation would be much higher if you have street access and a means of transportation to get to your property. If it is on certain types of streets, the better the streets, the more im-

provements in the streets, utilities, and so forth, the higher value would be paid for the adjacent land.

Now, having paid the substantial value, having already been reflected in the value which we paid to the private individuals who owned property abutting those public streets, the only remaining value is a value or compensation which we are only required to pay in the event that the public authorities find it necessary to create a substitute facility in [13] order to connect up highways or streets which are severed by the taking and by which the public have a means of getting around the area condemned.

I think the theory is most fanciful. Talking about the value of minerals underneath, if it is shown that there was oil possibility underneath public roads or the presence of oil or minerals, that it was a known fact, of course the value of those mineral rights might be established. But here we have a case set for trial on the question of just compensation, and all we hear is some theoretical argument about theories, that there is no proof of value that I see submitted here by the City or County or the Territory. If they have any expert witnesses who know of any special value of something lying beneath the beds of those streets, that's a technical problem with proof to be offered and considered.

The Court: How about the value of the air space problem?

Mr. Dolan: Well, I am not familiar with any case that was ever tried, that has ever tried to fix the value of air space over public streets. That would be rather

novel. It is novel to me, what value it has and what value air space has over any land. It is a theoretical and speculative value. I have never tried any one of those cases. As a matter of fact, I can't recall one that has ever been tried. I know there have been cases where by agreement land lying adjacent to airfields, where the Government wanted to control the elevation of the take-off and approach, there has been some agreement worked out with the owners whereby they were paid certain compensation, privilege for the Government removing trees, and hazards, and so forth, and being able to approach the field at a very low level. How they arrived at those values is something I don't know. I think it is probably just a matter of agreement.

But here we have just a lot of fine legal theories, and we might say that the possibility of finding oil and gas being found beneath the surface of the land in Pearl City—that is pretty highly speculative. We have here presented solely the problem of appraising the surface of that land or the fee of that land, subject to public easements. And if there is any case that holds, or ever has been, that they are entitled to more than the public authority entitles, to more than the nominal damages, I am not acquainted with it.

The Court: Mr. McKinley, the argument you have advanced, as mentioned before, is somewhat novel. It does seem to me that there is a possibility which could occur with respect to any public street or road—it must have been reflected upon, at least,

even though not discussed in any of the decisions save and except possibly the one in New York to which Mr. Dolan made reference. But over and beyond that; and assuming argumentatively at least that the Territory has given to the City and County title to the fee underlying this [15] road easement, are you further prepared to put on evidence to establish that the property underneath this road has some peculiar value because of the minerals involved or anything of that sort?

Mr. McKinley: No, your Honor. I cited the instance of the value of mineral rights or valuable air rights, and with reference to air rights I think we will find cases such as the Chicago Lakefront area involving the Illinois Central. But I merely cited those instances to show that the rule was a general rule and subject to exceptions. Now, if we admit that it is a general rule and subject to exception, it would appear to me to be a consequence that in the absence of any of these decisions pointing out that they had considered the fact that this fee could be disencumbered, and in spite of that, that it still has only a nominal value, then in the absence of such a pronouncement by any of these circuit courts—and I will say that I have read the decisions carefully and not in any one have I come upon a point where any part of the decision, where the court has considered that point, in the absence of that, then, we must consider the generality, and we are prepared to show that we can deliver free and unencumbered title, and



we are prepared to show that that title has market value. That in substance is our case.

Now, in reference to Mr. Dolan's statement to the effect that we don't have the authority to deliver a free and unencumbered [16] title, I would like to cite page 70 and page 71 of the Federal Eminent Domain, Lands Division, prepared by the Department of Justice, which reads as follows:

"In many jurisdictions, even when the municipality or county does own the fee, abutters possess easements of light, air, and access to the public street, for the taking of which the United States would have to pay just compensation, though the creation of this property right by the courts has been severely criticized. It is the general rule that an abutting owner has no such right in the maintenance of the status quo as to be entitled to compensation for the closing of a highway; but the rule would be otherwise in most jurisdictions where such closing deprived the owner of all means of access to any highway, sometimes even where the discontinued street, though laid out on maps, had never been opened. Despite a conflict of authority as to whether an abutting owner has a compensable property right in maintenance of the same degree and means of access previously enjoyed, the best considered cases seem to hold that he has not."

Now, in the light of that legal statement I would say that considering our 25,000 lineal feet of roadways which are of substantial width, the City and County

has the opportunity of abandoning portions of those and allowing only trails in the [17] remainder. And the portion that is abandoned the City and County, or the Commissioner of Public Lands, can deliver free and unencumbered title to that portion.

The Court: But you abandon roads in this particular area without the consent and approval and waiver of the owners who bought the lots originally on the strength that they had a right of access.

Mr. McKinley: Well, this last statement here that, "Despite a conflict of authority as to whether an abutting owner has a compensable property right in maintenance of the same degree and means of access previously enjoyed, the best considered cases seem to hold that he has not.

Now, assuming that he would protest, and assuming that protest would be a subject of jurisdiction of the court, citing the authority of Eminent Domain prepared by the Lands Division of the Department of Justice, it would appear that under their own authority we do have the right to shrink, just as we have the right to expand, and when we shrink it, according to our existing law, the title, the free and unencumbered title, vests in the Commissioner of Public Lands to do what in his judgment and the judgment of the Governor and the judgment of the President of the United States——

Mr. Dolan: Your Honor, the last statement he read, the last part of that statement, as to what that means, what is meant by that, is that an owner or property abutting on a public street is not necessarily and always entitled to that same means of access. If

the City or County or whoever owns the fee title to the bed of the street can by taking that particular street afford that owner an equal access, an equally accessible means of ingress and egress to his property, possibly one would offset the other. That is exactly what it says. In other words, he is not entitled always to the same type of a highway or the same means of getting to the property. But you cannot take the only means of access away from him and deny him all access without giving him a substitute, without incurring the obligation to pay just compensation because you are taking the property right away from him.

Now, I know that case after case in New York City, which I am particularly familiar with—I am familiar with the ones in Chicago—but I know many, many street closing cases in New York City where very substantial compensation is paid to the abutting owners for denying them the right of access. And I don't believe that any governmental agency has the right to deprive an abutting owner on public streets of either access or light and air without paying just compensation, as the City of New York pays out millions and millions of dollars every year for the construction of the superhighways which are elevated and which pass right by apartment [19] windows and sometimes cut off light and air and which cause damage due to noise; and the obnoxious character of the traffic passing right by—sometimes it will go right by the second or third story of a big apartment house. And they are paying compensation for such

takings all the time when, as a matter of fact, not one foot of the actual land is being taken upon which that apartment house rests, because they build these superhighways in tiers, that is, they will put a superhighway over an old existing street so that you have traffic flowing below and traffic flowing above. And when they construct those pillars and that roadway which cuts off light and access, creates noise and disturbance, they pay very substantial compensation for it.

Mr. McKinley Let us assume that we have a street out there of 80 feet in width. I think many of them are easily that, some probably wider. In the event the city and county would adopt a resolution abandoning the medial 40 foot strip, allowing 20 feet on each side and some at the intersection to pass from one side to the other, it would be our theory that that would be within the power of the city and county. And accepting these as the authorities for the proposition that the adjoining owner does not have a vested right in the status quo, he has a vested right which can be enforced in my belief to reasonable means of access and reasonable light and air. That is not our contention, to deprive [20] them of the entire thing. We can and we do have the authority to disencumber. Now, another point that Mr. Dolan touch on——

The Court: Before you move on to the other part, perhaps I can understand you a little better. You contend that with respect to the street I live on and you live on, that the city and county would come along

for some cause known as sufficient to itself and decide to change the street on which our houses are located to a cow path without any compensation to the owners of houses along that road?

Mr. McKinley Well, I will cite you an instance, one that happened up on the Waianae portion of the island. There was a road leading directly down to the ocean, and the automobile traffic in that road was heavy. And finally the Territory shrunk that street down to the point where it prohibited the entry of any motor vehicle down to the street, and the adjoining lands were sold to the abutting owners.

The Court: Well, I don't doubt that, what may be done in rural areas without objection, but the proposition you are contending for would be applicable everywhere, and I can't follow your contention that the city and county has the right to shrink any street here in the city, for example, without having to pay damage, just compensation to property owners who are affected detrimentally by the shrinkage.

Mr. McKinley: In that case, in the event of special damage, but not general damage. [21]

The Court: Well, I'd like to have you try it on the street I live on.

Mr. Dolan: You can't enlarge them without paying the adjoining owners and I doubt if you can shrink it. But aren't we dealing entirely with a lot of theory and speculation?

The Court: I am afraid we are. I was coming to that.

Mr. McKinley: I was trying to make this point clear, that Mr. Dolan referred to a little earlier, that in the absence of proof, and so on, it was my understanding that the setting this morning was on the question of determination of the law. And in the event that your Honor concludes that even as a point of law, together with an offer of proof, that we can deliver free and unencumbered title, and in the absence of proof that title has substantial value, then we are entitled to no more. But in the event that we make such an offer, then I understand that our opportunity of presenting the proof will be at a later date.

The Court: I see that your witness has arrived. Well, I will hear your witness. He is going to testify to the fact that you can deliver a free and unencumbered title?

Mr. McKinley: Yes, your Honor.

The Court: All right. Let me hear him now.

Mr. Dolan: Your Honor, this was set down and notice made back in May for the issue of just compensation. It is not on legal theory. It is a purpose of offering proof of [22] value. Of course, the law comes into the determination. This is the time, if they want to offer proof of value, that they have an opportunity to do it. We didn't set it down on motion or a demurrer or question of law.

The Court: That's right. It is set for trial.

Mr. McKinley: Well, if you want to become technical, we have a demand for a jury trial in here, and we have not been afforded an opportunity to pick a

jury. I was in your office the other day and told Mr. Deuel my understanding, that in view of the nature of this hearing, it was in the nature of a hearing to determine whether we had any substantial value or nominal value and having determined that then we would be in the position, or rather in the event that it was nominal there would be no trial. In the event it was substantial, we would be given an opportunity to show the extent and degree.

Mr. Dolan: Your Honor, I'd like the record to also show that despite the stipulation that has been referred to of March 24, 1949, I believe it is, although the year doesn't seem to appear on it—I imagine it is this year because there is a stamp on it, March 24—no, it must be '48—the stipulation says that it is the 24th day of March, it doesn't say the year.

The Court: 1948.

Mr. Dolan: I'd like the record to show that as far as the Government is concerned, we do not recognize the validity of this stipulation to transfer any legal title owned by the Territory of Hawaii to this land to the City and County of Honolulu, nor do we concede that such a stipulation has the legal effect of transferring any legal title to the bed of those streets to the City and County of Honolulu, or that the effect of the stipulation or that the legal effect of the stipulation would be to vest in the City and County any rights to compensation or any rights to be heard on the question of compensation for the value of the fee if it was owned by the Territory of Hawaii.

The Court: Well, that may be recorded, as it is, of course. And you are technically right, that this case is set for trial. But I will handle it, in the event that I find that the City and County has an interest, I will continue it for trial. I will hear your legal proof this morning.

Mr. McKinley: Thank you, your Honor.

The Court: Call your witness.

FRANCIS H. KANAHELE

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: Francis H. Kanahele, 53 years old, Public Lands Executive Officer, Territory of Hawaii.

The Court: You live here in Honolulu? [24]

The Witness: All my life.

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively, only?

The Witness: Only.

The Court: All right.

The Witness: Maybe we have a dual citizenship in that we have a Hawaiian flag, but it is only temporarily or——



(Testimony of Francis H. Kanahele.)

The Court: All right. Mr. McKinley.

By Mr. McKinley:

Q. What is your occupation, Mr. Kanahele?

A. I am the Executive Officer of the Public Lands Office; in the absence of the Commissioner of Public Lands, I serve in his place.

Q. That is a Territorial Commissioner?

A. That is Territorial Commissioner of Public Lands.

Q. And how long have you been so employed?

A. About a year. I may add, however, that for 25 years prior to that I was very much in connection with the Land Office because of my former status as a government surveyor.

Q. For the purposes of the record, the function of the Commissioner of Public Lands is to keep track of all the lands owned by the Territory and with reference to their being appropriated to certain uses? [25]

A. That is right.

Q. And in certain instances the Commissioner receives title for the Territory and in certain instances the Commissioner deeds title out and conveys out, that is, as an officer of the Territory?

A. He is a person instrumental in the transfer or in the receipt, only, however, in the name of the Territory; never in his name.

Q. I see. Mr. Kanahele, are you prepared to cite instances to the Court whereby the Commissioner of Public Lands in the name of the Territory has executed deeds of land which were at one time public

(Testimony of Francis H. Kanahele.)

streets, highways and roads, the consideration of which was substantial?

A. I do not know of any specific case but there are numerous on record.

Mr. McKinley: I want to apologize to the Court. I wrote a letter to the Commissioner of Public Lands in which I requested that he be prepared to cite specific instances, and I must confess that in the absence of not having talked to the witness before—I was taken a little aback there. But I just don't know what to say except that whether in the event that counsel will not agree that we are in a position to cite specific instances that we be given a short opportunity to assemble these specific instances for the purpose of entering them in the record. [26]

Mr. Dolan: Well, your Honor, I know as a matter of fact that such a thing can be done, no doubt about that. That is academic. You don't need to cite examples. The circumstances under which streets are abandoned and made available for sale by municipality or counties or states is the thing we are interested in, not particularly the thing that it can be done. We know it can be done. But the circumstances surrounding what were the conditions of the abutting property, whether these streets had ceased, the areas had ceased to be used for public streets, whether substitute facilities had been created which rendered their abandonment necessary or justifiable—all those things are what we have concern with here, not the mere fact, the mere academic question of whether it can be done.

(Testimony of Francis H. Kanahele.)

The Court: Well, apparently this is as far as the witness is currently prepared to go.

Mr. Dolan: I'd like to examine him a bit, your Honor, if I may, up so far as we have gone.

The Court: All right. Are you through with him or did you have some other subjects to cover?

Mr. Dolan: Did you have anything further on these instances?

The Court: In other words, I was about to say, I will assume that you could cite specific instances.

The Witness: Yes [27]

Mr. McKinley: Then I am finished with the witness, your Honor.

The Court: All right.

### Cross-Examination

By Mr. Dolan:

Q. Are all of the lands within the bed of public streets in the City and County of Honolulu, are all of those lands owned in fee simple by the Territory?

A. They are.

Q. What interest does the City and County of Honolulu have in those streets, what interest?

A. As a creature of the Territory they are responsible for the maintenance and further carrying on of their utilities.

Q. In other words, the title, the fee title and all interest, legal interest in the lands, it is in the Territory?

A. That's right.

Q. But the burden of maintaining those streets and the use of the streets is vested in the City and County?

A. That is right.

(Testimony of Francis H. Kanahele.)

Q. Now, are the lands within the beds of public streets in the City and County of Honolulu public lands?

A. They are not. They have a peculiar feature. They only become public lands after the order rendering it abandoned.

Q. So up until the time that there is official action taken whereby areas within public streets are officially [28] abandoned and no longer used for public streets——

A. They become public lands.

Q. ——then from that time on they become public lands?      A. That's right.

Q. What do you mean by public lands?

A. Public lands are lands that come under the control of the Commissioner of Public Lands under Section 73 of the Organic Act.

Q. Well, now, is there any distinction between—strike that. What lands, if any, are the fee title in the Federal Government subject to control, use and management by the Territory?      A. All land.

Q. All land?

A. Except privately granted. All government lands except privately granted are Federal lands.

Q. In other words, the lands, the beds of these public streets that we are discussing here, are in the Federal Government, subject to use, control and management by the Territory?

A. The Federal Government has already dedicated that usage to the Territory.

Q. In all the public streets?

(Testimony of Francis H. Kanahele.)

A. That's right.

Q. By what law? [29]

A. By the Organic Act.

Q. By the Organic Act? A. That is right.

Q. What section is that? A. Section 73.

Q. Now, isn't it a fact that by Section 73 of the Organic Act it was expressly provided that the public lands excluded lands which were used for street purposes and those lands never became vested in the Federal Government when lands of the Territory were ceded to the Federal Government?

A. The use—the quotation would be ambiguous if it were so, because——

Q. Now, isn't it a fact that there was a time prior to August 15, 1895 when all of the land in the Territory was either owned by the Government or the Crown? A. That's right.

Q. Then by a cession certain lands were called public lands and ceded by the Crown or the Government to the United States? A. That is right.

Q. And that took place about 1895?

A. 1898.

Q. Well, now, isn't it a fact that when that took place lands within public streets were not included but expressly excluded and did not pass to the Federal Government [30] as public lands?

A. It could not have been excluded.

Q. Well, isn't it a fact that the act expressly says it is excluded?

A. In section 2 there is, rather in paragraph 2 of Section 73——

(Testimony of Francis H. Kanahele.)

Q. Paragraph 3 you mean?

A. Yes, paragraph 3. I beg your pardon. It implies that. But on the next breath it gives it to the Territory for its usage.

Q. Well, now, what next breath? In another paragraph or in another section or by some other law or what, or in this same paragraph?

A. In the same paragraph it implied that.

Q. Well, now let me get your position straight. If your position is correct, the fee title to the lands in the beds of these streets in this proceeding on the date of taking so-called in this proceeding, the proceeding was instituted and the declaration of taking filed, on and prior to that time the fee title to the lands in the beds of these streets involved in this condemnation proceeding was already in the Federal Government subject to use, control and management and supervision by the Territory and by a later delegation to the City and County?

A. No, I think that needs a little clarification. Under 91——

Q. All right. Go ahead.

A. ——all lands turned over that were of government status at the time were fee in the Federal Government. Under 73, however, there is a little different application. Certain ones may be bought by Territorial or agencies created by the Territory. In my lay view of it, is that they should only buy in the name of the Territory.

Q. Do you know—pardon me, are you through?

(Testimony of Francis H. Kanahele.)

A. Yes.

Q. Do you know when the fee title to the bed of these streets within the Pearl City Peninsula was acquired by the Territory or by the Crown or by whoever acquired it? I mean when they started, devoted it to street purposes.

A. The O. R. and L. owned it.

Q. Owned it in fee? A. That's right.

Q. And who bought it for them or condemned it or how was it acquired and by whom so that it could be converted from private ownership to use as public streets?

A. It was turned over to the Territory.

Q. By whom? A. By the O. R. and L.

Q. They subdivided that entire area, didn't they?

A. That is right [32]

Q. And dedicated certain areas on a filed map for use by public streets, for use by the public as streets for means of ingress and egress? Right?

A. That's right.

Q. Now, did they actually convey it or did they retain fee title subject to the use by public, by the public for dedication?

A. They actually conveyed the fee.

Q. By deed? A. By deed.

Q. Or by a filed map?

A. By deed and map, I should think.

Q. And that deed went from the O. R. and L. Company to whom—the Territory?

A. I couldn't state positively now whether it was

(Testimony of Francis H. Kanahele.)

the Territory or County. But be it the County, it would be just the same implied that the Territory is the owner.

Q. Well, wouldn't it be true, though, that if that land was so acquired by the Territory, it never was public land in the sense that it was owned by the Federal Government and never been ceded, having been acquired? Supposing it was acquired subject to the cession in 1895, and it was acquired from the O. R. and L. either for a substantial or nominal consideration by the Territory. The United States Government never had any beneficial use or any right, title or interest [33] in the land in the bed of the streets. Wouldn't that necessarily follow?

Mr. McKinley: If the Court please, I'd like to make an objection. I think that the present examination is going beyond the purview of the direct. The point hasn't been raised by us. It is a condemnation. And our position is that the fee is in either the Territory or the City and County, that is, depending on the effect that your Honor attaches to the stipulation. In the event that the fee were by deed to the City and County automatically by the provision of law the title would evolve to the Territory. So we are entering into a question which I think is outside the purview——

The Court: Well, I think that is Mr. Dolan's position, too, isn't it?

Mr. Dolan: Well, I contend that this stipulation, why it was prepared or entered into, obviously some



(Testimony of Francis H. Kanahele.)

deed between the Territory and Attorney General's Office and City and County Attorney, and so on, has no effect other than transfer any rights to share in the compensation from one to another. But it certainly doesn't affect the basic principle as to where the title was.

The Court: You aren't contending that the Federal Government has the basic fee as he suggested?

Mr. Dolan: I am not contending that but I understood from Mr. Deuel that that was exactly Mr. McKinley's position as discussed with him on the telephone the other day. Mr. Deuel isn't here but it was related to me that Mr. McKinley's position was that this land already was owned by the Federal Government and he was going to move to dismiss the proceeding as to the taking of these streets on the ground that we already own it, that the Court had no jurisdiction. Now he seems to be in an entirely different position.

The Court: Well, there is some misunderstanding. Anyway, the witness is suggesting the idea that maybe the Federal Government already had the fee. But I think you have pointed out to him wherein both you and Mr. McKinley are in agreement that being acquired directly from a private ownership the title is exclusively now in the Territory.

Mr. Dolan: Well, I'd like to get this answer. He is in charge of the land office. I'd like to get his views on it, not so much from the legal as the factual background; upon which the Court can make a determina-

(Testimony of Francis H. Kanahele.)

tion, because it is a judicial question anyhow. I would like to explore it just a little bit more for my own enlightenment and possibly for the enlightenment of the Court.

The Court: Well, let me ask him a question first. What I have just said, is that your view, that being after acquired property, after the date of the Organic Act, this deed of O. R. and L. to the City and County placed the title of these streets in the Territory as a matter of law? [35]

The Witness: That is right.

Q. (By Mr. Dolan): Well, now, isn't it a fact historically that the title which passed to the Territory from O. R. and L. was subsequent to 1895?

A. That is also right.

Q. Are you sure of that? Are you sure that that development didn't take place prior to the cession of land to the United States Government?

A. The law at that time had the same effect except the time of transfer is of a different date.

Q. Well, now, aren't we getting back to my original position that even had this transfer historically taken place prior to 1895 from O. R. and L. to the Territory or to the Crown or to the Government or what, even had that been a fact, the cession, public land from the Government of the Crown to the United States, that it excluded street areas, areas used for public highways and streets and which, if true, would under no circumstances or on either set of circumstances having been acquired prior to 1895

(Testimony of Francis H. Kanahale.)

or subsequent, never became vested in the Federal Government?

A. Well, I only have a layman's view of it, and I cannot give you the legal aspects. I really think that all streets are Territory.

Q. Without any right in the Federal Government? [36]

A. Without any right of the Federal Government.

Q. There are certain types of land which are owned by the Territory in which the Federal Government has no interest?

A. Yes.

Q. And there are other types of land in which the Territory has no interest?

A. Provided, however, that that condition was prior to 1898. Then the Federal Government would come into the picture. But subsequent to 1898 it is a rather different aspect, as I see it, from a layman's point of view.

Q. Well, now, do you know of any instances where public streets, land used for highway purposes within residential, commercial or industrial areas, have been abandoned for public streets and sold for a substantial consideration, where no substitute facilities or access was provided or damages were not paid to the abutting owners?

A. There are numerous on the books.

Q. And you will furnish us with the details, maps, showing where the areas were, when they

(Testimony of Francis H. Kanahele.)

were abandoned, the type of property and all the details?

A. We have those records, except that I'd like to correct one word in your statement. The fee is not substantial.

Clerk's Note: For affidavit of Kanahele correcting use of word "substantial" see page 66)

cess or substitute road [34] or paid substantial damages to the abutting owners of the abandoned road.

The Witness: That's right. But when we sold those parcels they were not at a substantial price.

Q. You sold them to the abutting owners?

A. That's right.

Q. Who would be the only market for such parcels?

A. No, not necessarily. The law says that we first offer it to the abutter.

Q. They have a preference?

A. They have first preference.

Q. Can you imagine who would be wanting to buy those narrow strips after abandoned roads other than the abutting owners, what you could use them for? A. Yes, they can——

Q. Well, what access would you have to them? How would you get to them to use after you sold them off and they had no means of access?

A. Access, however, is always invariably, rather there from one extremity of the road.

Q. Most of these cases were dead-end streets

(Testimony of Francis H. Kanahele.)

or something where they weren't built up around them?

A. That's right. But one end of it would always be accessible.

Q. What is the procedure for public street abandonment? [38] What do you do? Do you have a public street which is being used by the public which the public hasn't abandoned, the public is using it, and the abutting owners are using it as a means of getting to their residences or their business, but the Territory decides they want to legally revoke the public use of that land for highway purposes and close off the street, what we call back east a street-closing proceeding?

A. That is your version.

Q. I am trying to get what your version is and how you do it.

A. This is how we do it: first the abutters are contacted to see if they are interested in abandoning that particular piece of land or parcel of road; then the Board of Supervisors act on that phase; if they are willing to abandon it and be served by another road, they will so indicate and the Board then acts on abandoning that portion because of the new facilities that will be able to serve the same individuals by some other route.

Q. And supposing no substitute facilities are being created, no new facilities are in mind, and the abutting owners say, No, we are not going to con-

(Testimony of Francis H. Kanahele.)

sent to have this street closed off and have no access to our property, what then would take place?

A. Then I don't think the Board of Supervisors will abandon it. [39]

Q. Then providing the owners are being furnished with a substitute facility and they are agreeable to abandoning it, then you have an abandonment proceeding? A. That's right.

Q. And is there any compensation paid to anyone then?

A. It may be in kind. By that I mean——

Q. The creation of a substitute, giving them a substitute?

A. A substitute may be far better in advantage and so forth.

Q. Well, now, supposing this street—do you know of any instances where a street is served, that is, leaving the termini unconnected and this street not only serves the abutters within the area where you want to abandon it, the particular segment that you want to abandon, but also serves other communities lying adjacent and beyond, and then you have to get the consent of all the people that are served by that highway, don't you?

A. No, only the abutters.

Q. Well, now, supposing King Street down here between where it adjoins Kalakaua Avenue and then down here where it intersects—what is the next street it intersects down here?—well, that runs clear on through the city, doesn't it? A. Yes.

(Testimony of Francis H. Kanahele.)

Q. Well, supposing you wanted to abandon a segment [40] of King Street up here for about two blocks as it approaches Kalakaua Avenue. Now, that street serves people Ewa, so to speak, and Waikiki, so to speak, not only the people abutting on it. A. That is very true.

Q. So that those people, the rest of the public served by those streets, have an interest in those streets for access? A. They have.

Q. As well as the abutting interest?

A. They have an implied interest.

Q. And to a certain extent the value of their land abutting on that street is determined to some extent even though the land lies without the particular segment you want to abandon——

A. It is a very remote value that they have.

Q. You think it is remote, that the public street system of a city is remote in the element of value reflected in all of the land in commercial, business and residential areas?

A. No, I don't mean that. I mean those that are away from the abutting sections.

Q. Providing they had other means of access, it would be all right? A. That's right. [41]

Mr. Dolan: All right. Thank you very much. It has been very interesting to me, if it hasn't been much to the Court.

The Court: Mr. McKinley, any questions?

(Testimony of Francis H. Kanahele.)

Redirect Examination .

By Mr. McKinley:

Q. Mr. Kanahele; the streets, the subject matter of this condemnation, lying as they do below O. R. and L., are not arterial highways in the sense they serve other communities and the communities approaching the Pearl City Peninsula?

A. That's right. They are dead-end streets.

Q. Now, upon the hypothetical situation of a cul-de-sac network of streets comparable to the network of streets in the Pearl City Peninsula, upon the assumption that those streets are in average 80 feet in width; upon the further assumption that the Board of Supervisors adopted a resolution abandoning portions of those streets, the medial portion consisting of 40 feet, leaving a 20-foot lane on each side of it, would your office, the Commissioner of Public Lands, have the power to deliver free and unencumbered title to that portion of the network abandoned by the resolution of the Board of Supervisors? A. That is right.

Mr. Dolan: That is purely an assumption, of course; that is purely a legal assumption on his part. [42]

Mr. McKinley: Beg your pardon?

Mr. Dolan: Of course, that is purely a legal assumption on his part.

Q. (By Mr. McKinley): Are you prepared to cite specific instances whereby the City and County of Honolulu, the Board of Supervisors, has by



(Testimony of Francis H. Kanahele.)

resolution abandoned portions of public highways and your Commissioner of Public Lands by virtue of his office has conveyed that property out for a substantial consideration either by way of exchange of other land or receipt of money?

A. There are numerous instances that I could cite if given the chance to.

Recross-Examination

By Mr. Dolan:

Q. The fact remains that when this peninsula, Pearl City, was taken by the Government, there had been no abandonment proceedings instituted or anticipated on these streets as far as you know?

A. That is right.

Q. These streets were dead-end streets in the sense that when you get to the end of the peninsula or either side of it, you run into water, but they weren't dead-end streets in the sense that people in Honolulu couldn't get down through Pearl City in those streets? They served the communities lying to the north of the peninsula as a means of access into [43] the peninsula area?

A. Into the peninsula area.

Q. Isn't it a fact that some of the lands which were dedicated for public streets within that Pearl City Peninsula were dedicated by owners of land who subdivided it, developed it after the O. R. and L.'s original subdivision?

A. That is right.

Q. Do you know whether those people who so dedicated certain street areas ever actually con-

(Testimony of Francis H. Kanahele.)

veyed the fee title to the bed of the streets to the Territory?      A. Not to the Territory.

Q. Did they convey it to anybody?

A. It rested with them.

Q. The fee title remained in them subject to public easements of ingress and egress?

A. That's right.

Q. How much of the area of the streets within the Pearl City Peninsula was in that category?

A. That were not conveyed, a very small percentage.

Q. By "very small percentage" what do you mean?

A. Oh, I imagine it would be within one or two per cent.

Q. Of the total area?

A. Of the total area.

Mr. Dolan: I think that's all.

The Court: All right. I see no need of continuing [44] this matter to allow the witness to provide specific illustrations of abandonment of public ways, for definitely they would be instances which would have to be individually explored to find the various reasons and the methods in which they were handled.

The contention advanced by the City and County, as I have said, is novel and ingenious. If there was some offer to prove that under this particular road there was some valuable mineral or that there was some valuable air right above it, I might give it

more time. But on the proposition that in point of law under certain circumstances the Territory might be able to get back unencumbered fee which it could sell, that is not to my mind warranting a conclusion that therefore the Territory is entitled to more than the nominal value for its fee, subject to a road easement. The ifs and so forths would have to be explored before arriving at a conclusion that the Territory could do as the City and County Attorney contends.

In the absence of specific data showing that it was done in this instance gets us into the field of speculation. The important fact is that as of the date of this taking this road had not been abandoned. It was a public highway or road; more precisely, an area of land the fee to which was owned by the Territory subject to a public easement for highway and road purposes. And that is the condition under which [45] it was taken and it is in that condition that the Government must pay for it, not what the City and County and the Territory might have done under different circumstances or rather different date.

I am, therefore, going to hold that in point of law, the weight of authority to the effect that under such circumstances the public body is entitled to only nominal value, is the rule which is applicable here. Accordingly, that being the rule, I will award the Territory the nominal value of one dollar for this public way which has been taken for the fee underlying that public way rather, and that being

the ruling of the Court in point of law there is no need of continuing the matter for the introduction of specific evidence on the point that Mr. Kanahele said he could furnish for the illustrations of it.

Mr. McKinley: If the Court please, if I may be permitted I would like to take an exception.

The Court: Yes.

Mr. McKinley: Upon our offer to present evidence that the Territory has the power and capacity to deliver free and unencumbered title to these roads and ways for a substantial——

Mr. Dolan: May I ask the county attorney to state as a matter of record whether or not he has any proof available or would propose on any further hearing to submit any evidence [46] that as a result of the taking of these public street areas within the Pearl City Peninsula the City and County of Honolulu or the Territory of Hawaii was required to build at its cost and expense any substitute streets or highways to replace those taken?

Mr. McKinley: In all candor I will say that we have considered that aspect and the answer is negative, that the city feels it is under no necessity to build substitute roads.

The Court: I have been out there and seen the area and I know that as a fact, too.

Mr. Dolan: And, your Honor, I'd like the record to show, as I did state at the earlier hearing, that we did leave the main highway running through the center of the peninsula as a public street, and it still is being used.

The Court: All right. You may submit an order for the Court's signature based on the ruling.

(The Court adjourned at 10:36 a.m.) [47]

I, Albert Grain, Official Court Reporter, U.S. District Court, Honolulu, T.H., do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 695, United States of America versus 34.03 acres of land, et al., held on July 11, 1949, before the Hon. J. Frank McLaughlin, Judge.

/s/ ALBERT GRAIN.

Aug. 15, 1949.

[Endorsed]: Filed August 15, 1949. [48]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Hawaii.—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings of record in said cause:

Petition for Condemnation.

Appearance (Territory of Hawaii).

Appearance (City and County).

Order Amending Petition.

Appearance (City and County).

Answer of the City and County of Honolulu.

Demand for Jury Trial.

Motion for Order Amending Petition.

Order Amending Petition.

Declaration of Taking.

Order and Judgment on Declaration of Taking.

Stipulation.

Notice of Settlement of Order.

Order Fixing Just Compensation.

Affidavit of Francis H. Kanahele.

Notice of Appeal.

Bond for Costs on Appeal.

Designation of the Contents of the Record on Appeal.

I further certify that included in said record on appeal is a copy of the transcript of proceedings of July 11, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of September, 1949.

[Seal]     /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

[Endorsed]: No. 12376. United States Court of Appeals for the Ninth Circuit. City and County of Honolulu, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed October 10, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 12376

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
vs.

34.03 ACRES OF LAND, more or less, located at  
Pearl City Peninsula, Oahu, Territory of Ha-  
waii, CITY AND COUNTY OF HONOLU-  
LU; Territory of Hawaii, FRANK L. JAMES,  
et al.,

Defendant-Appellant.

STATEMENT OF POINTS ON APPEAL

Now comes the City and County of Honolulu, Appellant in the above entitled case, and specifies the following statement of points to be relied upon on appeal:

1. The Court erred in determining the fair value and just compensation to be the sum of only One Dollar (\$1.00) which should be paid by Petitioner, United States of America, to the Territory of Hawaii and the City and County of Honolulu for the taking of the fee title to the streets and highways as described in the Petition for Condemnation and Declaration of Taking herein.

2. The Court erred in not allowing the value of said property to be awarded by a jury.

Dated at Honolulu, T.H. this 27th day of September, 1949.

Respectfully submitted,

CITY AND COUNTY OF  
HONOLULU,

By FRANK A. McKINLEY,  
Deputy City and County  
Attorney.

Receipt of a copy of the within Statement is hereby acknowledged this 27th day of September, 1949.

FRED K. DEUEL.

[Endorsed]: Filed October 10, 1949.



[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD  
TO BE PRINTED

Now comes the City and County of Honolulu, defendant-appellant in the above entitled case, and designates for inclusion in the printed record on appeal the following:

1. Petition for Condemnation, filed January 8, 1946;
2. Appearance of the Territory of Hawaii, filed January 10, 1946;
3. Appearance of the City and County of Honolulu, filed January 16, 1946;
4. Order Amending Petition, filed May 31, 1946;
5. Appearance of the City and County of Honolulu, filed June 6, 1946;
6. Answer of the City and County of Honolulu, filed June 29, 1946;
7. Demand for Jury Trial, filed July 1, 1946 by the City and County of Honolulu;
8. Motion and Order Amending Petition, filed March 27, 1947;
9. Order Amending Petition, filed March 27, 1947;
10. Declaration of Taking, filed March 31, 1947;

11. Order and Judgment on Declaration of Taking, filed April 1, 1947;

12. Stipulation, filed March 24, 1948;

13. Minutes of Court (entering proceedings—default entered City and County of Honolulu), filed July 11, 1949;

14. Notice of Settlement of Order, filed July 12, 1949.

15. Order Fixing Just Compensation, filed July 20, 1949;

16. Reporter's Transcript, filed August 15, 1949;

17. Kanehele's Affidavit, filed September 14, 1949;

18. Notice of Appeal, filed September 14, 1949;

19. Bond, filed September 14, 1949;

20. Statement of Points on Appeal.

Dated at Honolulu, T.H. this 27th day of September, 1949.

Respectfully submitted,

/s/ FRANK A. McKINLEY,

Deputy City and County  
Attorney.

[Endorsed]: Filed October 10, 1949.

No. 12,376

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CITY AND COUNTY OF HONOLULU,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

---

**APPELLANT'S OPENING BRIEF.**

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WILFORD D. GODBOLD,  
City and County Attorney of Honolulu,  
FRANK A. MCKINLEY,  
Deputy City and County Attorney of Honolulu,  
*Attorneys for Appellant.*

FILED

FEB 10 1950

PAUL P. O'BRIEN, Y



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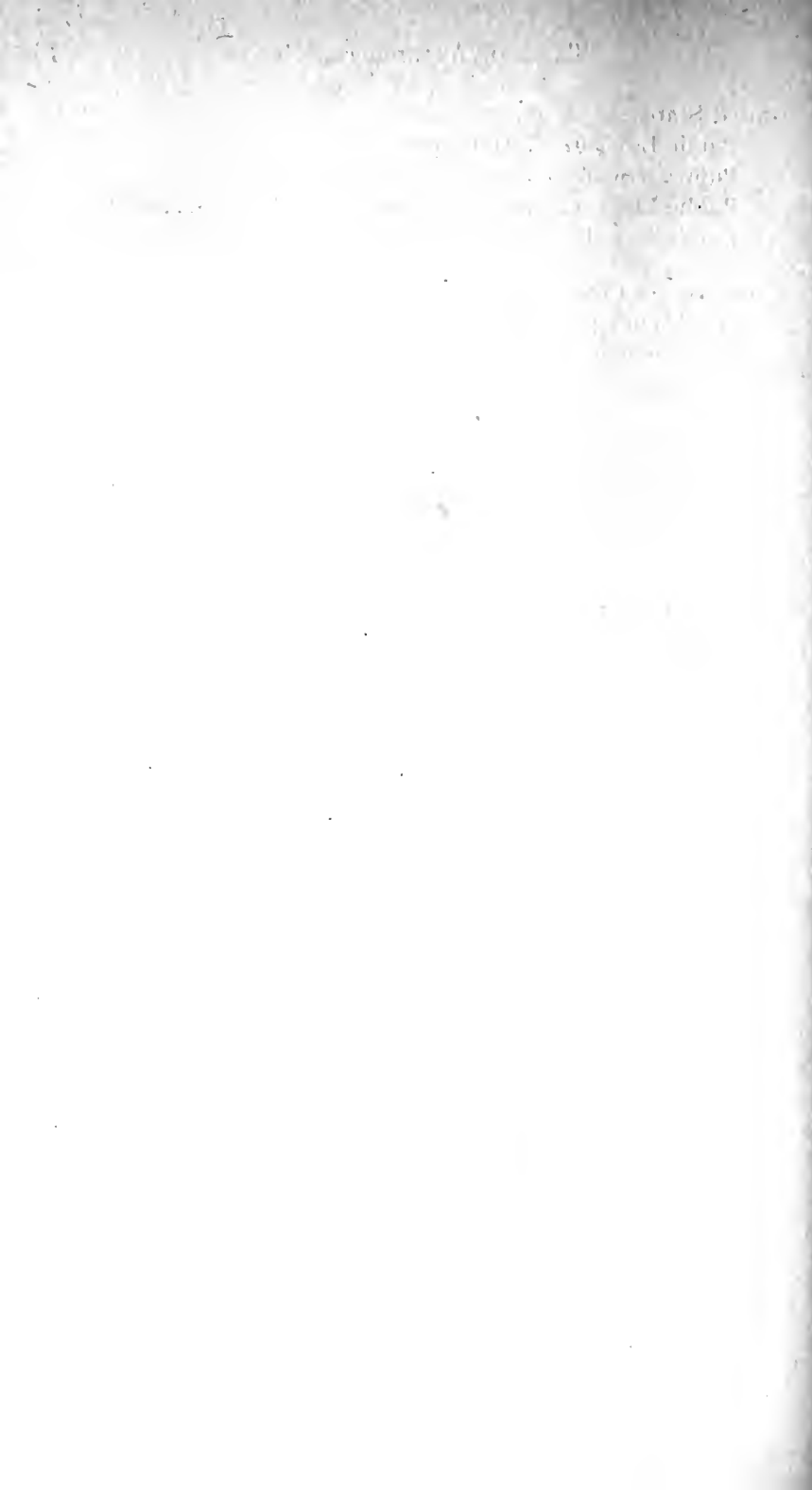
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No. 12,376

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CITY AND COUNTY OF HONOLULU,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

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**JURISDICTION.**

This is a condemnation proceeding instituted by the United States on January 8, 1946 (R. 2-8) in the District Court of the United States for the Territory of Hawaii pursuant to the authority of "divers and Sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942  
(Public Law 507—77th Congress) as amended by

The Act of Congress approved December 20,  
1944 (Public Law 509—78th Congress)

The Act of Congress approved June 26, 1943  
(Public Law 92—78th Congress)

The Act of Congress approved June 22, 1944  
(Public Law 347—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands being all streets, roads, and highways (except Lehua Avenue) and lie within the perimeter of the description \* \* \*." (R. 2 and 3). This appeal is taken from that portion of the final Judgment entered July 20, 1949 wherein it was determined that the Territory of Hawaii and the City and County of Honolulu should be paid One Dollar (\$1.00) for the taking of the roads, streets and highways in the Pearl City Peninsula. (R. 64-66.) Notice of Appeal and Bond for Costs on Appeal was filed September 14, 1949. (R. 69-71.) The jurisdiction of this Court is invoked by authority of Sections 1291 and 1294 (1) of the Judicial Code approved June 25, 1948. (28 U.S.C.A. Sec. 1291; 28 U.S.C.A. Sec. 1294 (1).)

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### **STATEMENT OF THE CASE.**

This is a condemnation proceeding instituted by the United States pursuant to the authority of several acts of Congress to condemn for the use of the Navy Department the fee simple title in and to all roads, streets and highways (except Lehua Avenue) lying below the Oahu Railway's right-of-way and within the Pearl City peninsula for the purpose of effecting the Pearl Harbor Security Strip Perimeter Acquisition. (R. 4-III.)

The Territory of Hawaii and the City and County of Honolulu were, among others, made Parties Defendant because they had or claimed some right, title or interest in and to said streets. Both the Territory of Hawaii and the City and County of Honolulu filed appearances in the condemnation proceedings (R. 8, 9 and 39); the City and County filed a Demand for Jury Trial (R. 42) and further answered that it was the owner of certain improvements and pavement along said streets as well as the owner of two concrete bridges. (R. 40.) A Declaration of Taking (R. 45-47) and Order and Judgment on Declaration of Taking was entered and filed in said proceedings March 31, 1947. (R. 58 and 59.) All interest save those of the Territory of Hawaii and the City and County of Honolulu had been disposed of by the District Court.

On March 24, 1948, a stipulation was entered into and filed in these proceedings whereby it was agreed, by and between the Territory and the City and County on the one hand and the United States on the other, that the City and County was deemed not only the owner of the beneficial interest in the streets, but also the owner of the fee and the Territory waived in favor of the City and County any right it had to compensation. (R. 60-62.)

On July 11, 1949, the case was called for trial on the claims of the City and County of Honolulu and the Territory of Hawaii. (R. 62.) The Deputy City and County Attorney stated that it was his understanding the hearing was for the purpose of having

the Court determine in point of law whether the interest of the City and County was nominal or substantial, and if the Court determined it to be substantial, the City and County would be given an opportunity to show the extent and degree. (R. 93.) The Court then ruled “\* \* \* in the event that I find that the City and County has an interest, I will continue it for trial.” (R. 94.)

Then followed argument by respective counsel and testimony of Francis H. Kanahele, Executive Officer of the Commissioner of Public Lands office that: 1) the Territory of Hawaii had fee title to all (R. 97-47-57) but a small percentage (1 or 2%) of the subject streets (R. 112), 2) the fee title was subject to an easement in the Public for road purposes, (R. 97-112), 3) the easement for road purposes or a portion thereof could be terminated by the Board of Supervisors adopting a resolution of abandonment, (R. 98 and 110), 4) the Commissioner of Public Lands could, in the name of the Territory, deliver a free and unencumbered title to that portion of the streets so abandoned, (R. 110 and 111), and 5) there were numerous instances where the Commissioner of Public Lands had, in the name of the Territory, conveyed out for substantial consideration either by way of exchange of land or receipt of money, lands which formerly had been encumbered by easement in the Public for road purposes and which had been disencumbered by adoption of a resolution of the Board of Supervisors of the City and County of Honolulu; (R. 111) no offer of proof was made by the City and

County to show that either the Territory of Hawaii or the City and County of Honolulu was required to build at its cost and expense any substitute streets or highways to replace those taken; (R. 114) it was conceded otherwise.

The hearing concluded with the Court determining in point of law that the interest of the Territory of Hawaii and the City and County of Honolulu was only a nominal one and "Accordingly, that being the rule, I will award the Territory the nominal value of One Dollar (\$1.00) for this public way which has been taken for the fee underlaying that public way, and that being the ruling of the Court in point of law there is no need of continuing the matter for the introduction of specific evidence on the point what Mr. Kanahele said he could furnish for the illustrations of it." (R. 113 and 114.) Exceptions to the Court's ruling were noted by the defendant, City and County of Honolulu. (R. 114.)

Thereafter, on July 20, 1949, an Order was entered in said proceeding entitled Order Fixing Just Compensation which order fixed the sum of One Dollar (\$1.00) to be paid the Territory of Hawaii or the City and County of Honolulu for the Taking of subject streets which order was entered subject to exception to Court's ruling reserved by the City and County of Honolulu. (R. 64-66.)

### **QUESTIONS PRESENTED.**

Whether the Court erred in point of law, that the City and County should be paid only \$1.00 for the taking of the Streets in Pearl City peninsula?

Whether the City and County was entitled to have the damages awarded by a jury?

---

### **STATEMENT OF POINTS ON APPEAL.**

Now comes the City and County of Honolulu, Appellant in the above entitled case, and specifies the following statement of points to be relied upon on appeal:

1. The Court erred in determining the fair value and just compensation to be the sum of only One Dollar (\$1.00) which should be paid by Petitioner, United States of America, to the Territory of Hawaii and the City and County of Honolulu for the taking of the fee title to the streets and highways as described in the Petition for Condemnation and Declaration of Taking herein.

2. The Court erred in not allowing the value of said property to be awarded by a jury.

---

### **SUMMARY OF ARGUMENT.**

I. Municipalities are entitled to the protection of the Fifth Amendment in the taking of their property by the United States.

II. The rule that “the true measure of compensation when a municipality’s streets are condemned is the cost of providing any necessary substitutes” *United States v. City of New York*, 2 Cir., 1948, 168 F.2d 387 at page 389, does not and should not apply when the municipality owns the fee which can be used for other than highway purposes.

III. The City and County could have delivered merchantable title to a substantial portion of the land taken by the United States, or could have appropriated it to other public purposes.

IV. The City and County is, under the Fifth Amendment, entitled to substantial compensation for that land to which it could have delivered merchantable title or could have appropriated it to other public purposes.

V. The City and County, having demanded a jury trial (R. 42), and not having waived said demand, is entitled, under the Seventh Amendment to compensation awarded by a jury.

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## ARGUMENT.

### I.

**MUNICIPALITIES ARE ENTITLED TO THE PROTECTION OF THE  
FIFTH AMENDMENT IN THE TAKING OF THEIR PROPERTY  
BY THE UNITED STATES.**

A. It is established that state or municipal property devoted to the public use is “private property”

within the jurisdiction of the Fifth Amendment which requires "just compensation" for its condemnation by the United States. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); *United States v. Wheeler Township*, 66 F. 2d 977 (C.C.A. 8th-1933); *Town of Bedford v. United States*, 23 F. 2d 453 (C.C.A. 1st-1927); *Town of Nahant v. United States*, 136 F. 273 (C.C.A. 1st-1905). In the light of the Constitution then, the taking from a municipality is the same as the taking from an individual. The disability, if any, is not upon the owner, but upon the value of the thing taken.

29 *Corpus Juris Secundum*, page 955, Eminent Domain, Section 130 reads as follows:

"\* \* \* The Federal Government cannot take nor authorize a taking of property which is held by the state for its own corporate and public use, such as highways and city streets, without providing for compensation."

See also 18 *American Jurisprudence*, page 805, Eminent Domain, Section 171, which reads as follows:

"Sec. 171. When taken by exercise of Federal Sovereignty. It is not within the competency of the Federal Government, without suitable compensation, to dispossess a state, county, town or city of its control and use of its public property, and appropriate the same to the government's own benefit, or the benefit of any of its corporations or grantees. The Federal Government's power of eminent domain is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger to the state agency. It can no



more take, without compensation, a town's property rights than it can those of an individual."

Such municipal property coming then as it does within the protection of the United States Constitution, it is axiomatic that that protection cannot be abridged by either the Legislature, or the Judiciary. Admittedly, any rule which provides for the payment of no compensation or nominal compensation, is in derogation of that protection afforded by the Fifth Amendment of the Constitution.

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## II.

**THE RULE THAT "THE TRUE MEASURE OF COMPENSATION WHEN A MUNICIPALITY'S STREETS ARE CONDEMNED IS THE COST OF PROVIDING ANY NECESSARY SUBSTITUTES" (UNITED STATES v. CITY OF NEW YORK, 2 CIR., 1948, 168 F. 2d 387, AT PAGE 389) DOES NOT AND SHOULD NOT APPLY WHEN THE MUNICIPALITY OWNS THE FEE WHICH CAN BE USED FOR OTHER THAN HIGHWAY PURPOSES.**

Let us examine the rule and inquire as to how it came into existence. In the *Alderson* case, *United States v. Alderson, et al.*, 53 F. Supp. 528, S.D. West Va., in January of 1944, the Court at page 529 stated

"There are few reported decisions upon the measure of damages for the taking of public highways. There are now pending throughout the United States a large number of proceedings to condemn highways traversing lands acquired by the Federal Government for military purposes, making the subject one of increasing public interest."

Thus it may be seen that as of January 1944, there existed no firm expression from the United States Congress or the Judiciary as to the proper measure of value when the United States condemns a public highway.

The rule first referred to, came into expression by Circuit Judge Sanborn in April 24, 1945, when he wrote the decision for the *Des Moines* case, *United States v. Des Moines*, 148 F.2d 448 (C.C.A. 8). Judge Sanborn stated at page 449:

“The question for decision is whether the United States, in condemning for military purposes, public roads within the area of the Iowa Ordnance Plant, in Des Moines County, Iowa, is obliged to pay the appellees as just compensation (1) the value of the roads taken, or (2) the cost of providing necessary substitute roads, or (3) nominal damages.

The District Court, after the trial of the issue of just compensation or damages in this proceeding to condemn the roads, found as a fact: ‘That the full, fair, reasonable and actual value of the roads and highways \* \* \* on the 1st day of March 1941 [the date of taking], was the sum of One Hundred Seventy-five Thousand (\$175,000) Dollars, which I find and award as just compensation for the taking of said roads and highways, with the bridges, culverts and improvements thereon.’ This award with interest resulted in a judgment for \$208,687.50 against the United States. It has appealed.

[1] The amount allowed the appellees by the District Court as just compensation for the tak-

ing of the roads in suit is not shown by the evidence to have any relation to any financial loss or out-of-pocket expense caused or which will be caused, by the taking. The amount apparently reflects the replacement value of reproduction cost of the roads taken, with interest added. *If it is unnecessary to replace the roads or to provide substitutes for them, the appellees have suffered no money loss and have been relieved of the burden of maintaining the roads taken. If it is necessary for the appellees to provide substitute roads in order to readjust their system of highways, they are entitled to the cost of constructing the necessary substitute roads, whether that be more or less than the value of the roads taken. This cost will give to the appellees the actual money loss which will be occasioned by the condemnation, and is the proper measure of damages for the taking.* United States v. Wheeler Township, 8 Cir., 66 F.2d 977, 984, 985; Jefferson County, Tenn. v. Tennessee Valley Authority, 6 Cir., 146 F.2d 564, 566, certiorari denied April 9, 1945, 323 U.S. ...., 65 S.Ct. 1016; Mayor and City Council of Baltimore v. United States 1945, 4 Cir., 147 F.2d 786. In fairness to the trial judge, it should be said that the two cases last cited were decided after the entry of the judgment appealed from.” (Italics our own.)

Judge Sanborn based his rule that the cost of necessary substitute roads was the *exclusive* measure of compensation upon the authority of the *Wheeler Township* case, the *Jefferson County* case and the *Baltimore* cases, *supra* pages 10-11. Judge Sanborn did not discuss either the *Bedford* case, *supra* page

8, or the earlier *Nahant* case, *supra* page 8. Since the *Nahant* case was copiously quoted from in the *Bedford* case we shall discuss only the latter—which incidentally, is the subject of an annotation in 56 A.L.R. 365 at pages 374 and 375, the excerpt therefrom is entitled b, “When taken by Federal Government acting under its own sovereign power.” Quoting from the opinion of the *Bedford* case the Court stated at page 453:

“\* \* \* the United States took, as of November 10, 1926, by eminent domain, for Veterans’ Hospital, a tract of land in the town of Bedford containing about 400 acres. The taking covered ‘all rights of every name, nature, and description in and to that portion of Springs road so called, as shown’ on a plan referred to. Springs road was an old road, used from time immemorial, and maintained at the expense of the town. The taking cuts out a half mile of the road, but the severance will render other portions unavailable and require new roads to connect the termini. The facts concerning the extent of the damage need not now be stated; for it is stipulated that, if the town is entitled to recover, the amount shall be \$10,000.

The Court below ruled against the town, without opinion. The single question here is whether the taking by the United States, by eminent domain, of a way located in the town, entitles the town to compensation.”

And again at page 454:

“While it is settled that in Massachusetts, ordinarily, towns do not own the fee in town ways

(*Inhabitants of Millbury v. Blackstone Canal Co.*, 8 Pick. 473) and that the easement is not technically vested in the town, but belongs to the general public (*Inhabitants of Andover v. Sutton*, 12 Metc. 182, 188), it is also settled that the town has a qualified property or interest in its highways (*McHugh v. City of Boston*, 173 Mass. 408, 53 N.E. 905)."

And again at same page:

"\* \* \* For present purposes, a town may be regarded as a group of taxpayers, charged, *inter alia*, with the burden of building and maintaining such highways as common convenience and necessity require. Any act that increases those burdens takes additional money from the group of taxpayers. A highway once built exonerates, *pro tanto*, that group; taken or otherwise destroyed, a new burden is imposed. To take the furnished means of meeting a liability imposed by law has the same effect as taking property technically vested; loss accrues. Bedford's rights in Springs road was as real a property right as a leasehold of the same land, or as an abutting owner's right of access to the street. And cases cited.

And continuing on page 456:

"\* \* \* These views were reaffirmed by this court in the same case (153 F. 520), where Judge Aldrich said:

'Just compensation' is the compensation vouchsafed to private interests by the Federal Constitution. This phase of the case is not upon arbitrary lines. The government in a situation like this in effect says the right to take is neces-

sarily arbitrary and must stand unchallenged; but having thus, under the strong arm of sovereignty, cut through private and municipal rights, the rigor of the arm shall be relaxed, and the government itself will see that just compensation is awarded accordingly. The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. Lewis on Eminent Domain, Sec. 464. In our view it is almost, if not quite, an element of the government's case to see to it that just compensation is ascertained and accorded. The question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one. The policy of the government is to absorb all interest, so that it shall remain undisturbed in the exercise of its dominion over the property, and to this end its purpose is to render constitutional compensation under legal principles, softened somewhat by broad considerations of justice.

Careful consideration of these two opinions makes it clear that many of the difficulties, logical and under the authorities, that the Court there met, grew out of the failure of the town of Nahant to claim full compensation—not merely for its structures in the streets, but for its right in the land constituting the streets. The logic of these two decisions covers all rights and interests that towns have in highways, and, as already noted, the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.

It should not be overlooked that, when our highway law took form, 'ways' were hardly more than strips of land, slightly, if at all, improved. To-day, as a result of the automobile, a large part of our highways are structures of stone and cement, costing more per mile than the original cost of many of our railroads. We can see neither logic nor justice in attempting to distinguish between such structures in the street as sewers, water pipes, and buttresses of bridges, and the structure constituting the way itself, and the right of the town to the use of the land, apart from any expenditure previously made thereon, by the town. The real question is one of the incidences of cost or expenditure; and there is no such thing as compensation, within the fair meaning of the word, unless the separate entity that under sovereign power appropriates a part of this town way is required to pay the expenses it thus imposes upon the town within whose territory it makes the taking."

And finally at page 457:

"\* \* \* Any increased tax burden resulting from such shifting of the public use of lands lying in any town is within the scope of the Legislature's general control over the allocation of tax burdens. 119 Mass. 360. But the federal government's power of eminent domain—necessarily implied as an efficient and appropriate means of exercising other powers expressly given—is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger to the town. It can no more take, without compensation, their property rights, than it can those of an individual.

The result is that, pursuant to the stipulation, the decree of condemnation is to be amended by awarding \$10,000 to the town of Bedford, with interest thereon from November 10, 1926."

The rationale of the *Bedford* case, as we see it, is that when the United States takes property OR imposes additional burdens it must pay commensurate compensation.

In the *Wheeler Township*, supra, page 11, case, the first of the three (3) cases relied on by Judge Sanborn that the cost of necessary substitute roads was the exclusive measure of compensation, the United States and Canada entered into a treaty to regulate the level of the Lake of the Woods and thereby submerge and render useless existing highways. On the question of whether the taking of the highways came within the protection of the Fifth Amendment, the Court stated at page 982:

"\* \* \* But if this language might be applicable we think it cannot control here for the reasons following. All condemnations by the United States are primarily controlled by the Fifth Amendment. While the amendment reads that '*private* property cannot be taken for public use, without just compensation' (italics added), yet '*private*,' as thus used, includes property which is ordinarily regarded as public property—such as that held for public uses by a state;" and cases cited.

"All of these cases concern streets or highways. That easements such as these highways are '*property*' is not open to dispute. They are



interests in land—incorporeal hereditaments;” and cases cited. “Therefore, these highways cannot be taken and their use as such destroyed without compensation under the Fifth Amendment.”

And again at page 984 as to the unique character of the case:

“\* \* \* The situation here is peculiar. To these exceptional facts we must apply such established general principles as are applicable in order to determine the proper measure of damage—or, more accurately stated, of compensation.”

And finally at page 984 as to the measure of compensation:

“\* \* \* When we come to the method of ascertaining the amount of compensation—the measure of damages or compensation—we encounter the peculiarities of this situation. We have a safe starting point in the above fundamental legal proposition that the township must be made whole from money loss. When the ordinary measure of loss (decrease in actual or assumed ‘market value’) cannot be applied, as here, then ‘whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.’ *Winona & St. Peter R. Co. v. Denman*, 10 Minn. 267 (Gil. 208), and see *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 328, 13 S.Ct. 622, 37 L. Ed. 463. Here we must be guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to

maintain its roads and that duty can be enforced. (See above citations from Minnesota statutes.) The expense therefor comes from the taxpayers of the townships, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and 'the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.' *Town of Bedford v. United States* (C.C.A.), 23 F. (2d) 453, 456, 56 A.L.R. 360. To the extent that this burden has been increased by this taking there is a deprivation for which the law requires compensation. Is this extent to be measured by the present inadequate road standard or by some other? To take the present standard seems unfair and insufficient. The proper standard is not that of the present inadequate roads on the one hand nor a high grade of highway on the other. It is that type of road which it is the legally compellable duty of the township to maintain. If the present standard be taken and tomorrow the township be compelled to build a better type of road there would, unquestionably, be an added expense in building such road caused solely by this condemnation burden. Why should not this added expense be made good by the one causing it? It cannot be done except in this proceeding. The existing status is not controlling. *Keefe v. Annepaul Realty Co.*, 215 App. Div. 301, 213 N.Y.S. 637, 642, 643; *Haight v. Littlefield*, 147 N.Y. 338, 343, 41 N.E. 696. On the other hand, a high type of road is too uncer-

tain and speculative of realization to be any guide, although there would, necessarily, be this added expense from the flowage to such road if ever built. But there is no injustice to appellant in being required to make good to the township taxpayers the added expense for that character of construction and maintenance of these established roads which can, at any time, be compelled, under existing state law, by five freeholders of the township or of an adjoining township in the same county. Mason's Minn. Stat. 1927, Sec. 2607. This standard, under that law, is a 'reasonably passable' road. Section 2607. The claim of the township and the measure adopted by the trial court was that of a reasonably passable road at the places affected by this flowage easement. In fact, the evidence for appellee is that the type taken as reasonably passable is 'the lowest type of road that they could build to allow any two way traffic to pass and it is the only thing that would stand up under most any traffic conditions'; that no 'lower standard or of a cheaper construction \* \* \* would stand up under the conditions that the roads are subjected to with the water elevated as provided for in the Treaty'; that it is 'the cheapest and most economical type of highway that can be constructed which would stand up and furnish reasonable highway service for Wheeler Township where the waters are left and maintained as provided for in the Treaty'; that 'a less adequate plan would only be of temporary service.' This evidence came from witnesses who, for the most part, were familiar with the soil and water conditions and were highly

qualified by training, experience, and occupation to testify concerning roads, their construction and maintenance. The township did not claim the entire cost of building this type of road but only the difference in expense between a passable road under natural lake levels and one under the flowage levels provided for in this condemnation. We think the measure of compensation was correctly submitted.”

As we evaluate the *Wheeler Township* case, there is no basis either in the factual situation presented to the Court or the Court’s opinion to warrant the conclusion that the cost of necessary substitute roads is, in all such cases, the *exclusive* measure of damages.

The second case cited by Judge Sanborn in the *Des Moines, supra*, pages 10-11, opinion was the *Jefferson County v. Tennessee Valley Authorities, supra*, page 11. In this case, the impounding of the waters by the Tennessee Valley Authorities so changed the landscape and so altered the physical geography as to obliterate 95 miles of improved public highways. Part of the factual situation presented to the Court, however, was that the T.V.A. “answered that at its own cost, it had constructed a new highway system for the appellant adequate to meet its transportation needs.”

And quoting again from the opinion at page 565, (F.R. 146-2d),

“The question presented is whether the obligation of the United States under the Constitution to pay just compensation when it dispossesses

a state, county, city or town of the control and use of highways and appropriates the lands on which such roads are located to the government's benefit or the benefit of any of its corporations or grantees is satisfied when adequate substitute road facilities are provided at the cost of the United States."

The concluding paragraph of the decision reads:

"\* \* \* As we view it, *under the facts in the record*, all that appellant was entitled to as damages for the taking of the land on which its highways were built, was the entire cost of restoring to its citizens an adequate highway system after the construction of the dam. Since the record shows that appellee at its own expense, has completely restored the highway facilities of the county destroyed on account of the construction of the dam, appellant is entitled to take nothing by these proceedings. Judgment affirmed." (Italics our own.)

It may be noted that here also the condemnee had only an easement in the highway.

The final authority relied on by Judge Sanborn was the *Baltimore* case, *supra*, page 11. In the *Baltimore* case, the United States condemned certain alleyways, the title to which under Maryland law, was in the abutting owners subject, however, to an easement in the public for road purposes. The Court stated, in part, at pages 788 and 789:

"\* \* \* In other words, the interest of the abutting owner is not a contingent interest but a present subsisting ownership of the fee, subject

only to the easement in favor of the public; and if, for any reason, the easement is abandoned, the entire beneficial interest in the land reverts to him."

It is important to note that the Court here considered three (3) aspects of our present question: (1) who owns the encumbered fee, (2) a fee subject to an easement in the public for road purposes may be disencumbered by the municipality and (3) a fee subject to such an easement is not contingent, but a "present subsisting ownership" or estate and this is so even where the power or capacity to disencumber vested in a third person /the city/.

Under the facts of the *Baltimore* case, the City had only an easement or the control of an easement. There was no showing to the Court (1) that it expended any money in the development of the alleyways (2) that the easement or the control of the easement had any market value, (3) that there was any duty to build substitute alleyways.

The Court in the *Baltimore* case had occasion to discuss the *Boston Chamber of Commerce* case, the pertinent excerpt reads as follows at page 789:

"\* \* \* In a number of cases effect has been given to these views. In *Boston Chamber of Commerce v. Boston* 217 U.S. 189, 30 S. Ct. 459, 54 L. Ed. 725, the City condemned for street purposes a parcel of land owned by the Chamber of Commerce over which for years a wharf and dock corporation had had an easement of way, light and air. The two owners united in demanding \$60,000 for their interests, which was con-

ceded to be the value of the land as an unrestricted fee; but the Court held that the parties had suffered little damage by the change of the existing easement for the benefit of the Wharf Company into an easement for the general public, and limited recovery to the sum of \$5,000 to which the parties had agreed as an alternative figure. The Court said at page 195 of 217 U.S., at page 460 of 30 S.Ct., 54 L. Ed. 725: ‘\* \* \* the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as matter of law, to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to \$60,000 under their agreement.’”

We feel that the result of the *Boston Chamber of Commerce* case is sound for the reason that the parcel had previously been appropriated to a special use and as Mr. Justice Holmes pointed out, disencumbrance of the fee could be accomplished only by a substantial diminution of value of the property of the Central Dock and Wharfage Corporation. A buyer of the encumbered fee could only reasonably expect to clear his title by the payment of a substan-

tial sum of money for the relinquishment of the easement.

Quoting from Mr. Justice Holmes' opinion, 54 Law. Ed. at page 727:

“\* \* \* The petitioners contended that they had a right, as a matter of law, under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate,—in other words, that the servitude must have been maintained in the interest of lands not before the Court,—but still according to the contention, by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.”

In Massachusetts, the taking for highway purposes did not include the fee, but imposed upon it an easement of public travel. Since the fee was already subject to an easement for light and air, the imposition of the additional easement for public way did not substantially diminish the existing value of the fee. Neither was the dominant estate injured by the superimposition of the public way easement onto its easement for light and air.

The *Maryland* case also discusses in *Re Public Beach, Borough of Queens, City of New York*, 269 N.Y. 64, 199 N.E. 5, some language from which is



quoted in the *California* case, *infra*, page 31. The principal point of the *Public Beach* case being that the city in condemning land for public beach takes land free from easements therein, but must compensate each owner of dominant tenement for the value of easement extinguished, which value is ordinarily represented by difference between value of dominant tenement before and after taking, and city must also compensate owner of fee for value of fee burdened by servitudes or easements.

The Court here stated (199 N.E. 5, at page 6) :

“\* \* \* In such case the ownership of the incumbered fee/beach land subject to an easement running to a large group for beach purposes and uses/ has no substantial value. It cannot be used for any purpose which will bring to the owner either profit or enjoyment. It is a burden rather than a benefit, and its taking relieves the owner of the burden”.

It is manifest that such language is predicated upon two assumptions: (1) that such easement destroyed all economic utility of the fee, and (2) that such easement was perpetual.

This bring us to what we consider to be a crucial distinction between the taking from private owners and the taking from a state, county or municipality. It is beyond the power or capacity of a private owner who subjects his fee to an easement in the public for road purposes to disencumber that fee. Consequently, when such land is condemned from the private owner he is awarded only nominal damages upon the basic

assumption that the easement running as it does for perpetuity, in the absence of any proof to the contrary, destroys the economic utility of the land and the land thereby has only a nominal value. Should, however, that fee, encumbered as it is with an easement in the public for road purposes, be acquired by a state, county or municipality having the power and capacity to abandon or change the public purpose or the use, then, in the face of such power and capacity to disencumber, the easement is tantamount to a revocable license.

Turning again to *Des Moines* case, *supra*, pages 10-11, it would appear that the three (3) cases therein cited are questionable authority for the proposition.

“If it is unnecessary to replace the roads or to provide substitutes for them, the Appellees have suffered no money loss and have been relieved of the burden of maintaining the roads taken. If it is necessary for appellees to provide substitute roads in order to readjust their systems of highways they are entitled to the cost of constructing the necessary substitute roads, whether that be market or less than the value of the roads taken.”

It may be pointed out that in the three (3) cases cited, the condemnees had only an easement and in the *Des Moines* case itself, the town had only an easement.

With reference to the Court's statement in the *Des Moines* case that the taking by the United States caused “no money loss” and “relieved” /the county/

“of the burden of maintaining the roads taken” it is desired to point out that a completed street, as stated in the *Bedford* case, represents a substantial expenditure on the part of the builder and that such expenditures are not made by accident, but upon the calculated expectation of obtaining a substantial yield in taxes from the property that is served by such street. Thus, where the Federal Government has as in this case, first condemned the property served by the instant streets, (R. 73), thus destroying the “*raison d’être*,” then condemns the streets themselves including the fee and offers to pay therefor the sum of One Dollar upon the premise that the cost of necessary substitute streets is the *exclusive* measure of damages and further justifying such taking upon the additional premise that no money loss has been suffered and also that it relieves the condemnee of the burden of maintaining the streets taken, is of no more logic than to condemn everything in the town, but the business district and then refuse to pay more than a Dollar therefor for the reason that since it served no purpose, there was need to relocate it and the owners were relieved of the burden of paying future taxes thereon.

Since constitutionalwise, ownership by a municipality is equivalent to ownership by an individual, are we right in basing our thinking on such criteria? What of the 101 non-productive activities in the community, parks, playgrounds, libraries, golf courses, schools, et al.? They all are a decided burden to main-

tain. In fact, every ramification of government, excepting only the Tax Collector's Office is a burden to maintain. Can we assert that (1) such money as has been poured into the venture is already lost and the taking by the United States causes no money loss, or (2) relief of this burden to maintain is justification for payment of only nominal damages? Such narrow reasoning would lead to the inescapable conclusion that the Public Works Department of a municipality is a decided liability because it spends indefinite thousands of dollars and never takes in a penny whereas, the Tax Collector's Office is entitled to a different measure of value because its expenditures are nominal and its income tremendous.

In a review of the three (3) cases cited as authority for the Des Moines ruling, the cost of substitute roads as a proper measure of compensation appears to be peculiarly well adapted to the fact situations of both the *Wheeler Township* and the *Jefferson County* cases. In both cases substitute roads were necessary and the Court held, in substance, that where the old roads were submerged, the United States discharged its Constitutional liability by providing new roads—a *quid pro quo* equitable result. But does it follow as a logical corollary, that in the event it is unnecessary to construct substitute roads, no constitutional liability is imposed? As for the *Baltimore* case, there was no need to apply the measure of compensation by cost of substitute facilities rule nor was there any showing by the City that it came within the ordinary rule of market value.

In view of the constitutional protection, however, and the fact that that protection cannot be impinged on by the Congress, or the Judiciary, is it not conclusive that the market value test, when available, should be applied to property owned by a municipality and that the formulation of any rule that would destroy the market value of the property sought to be condemned would be violative of the fundamental constitutional guarantees.

In short, the Judiciary may formulate a rule which would have as its effect an enhancement of the market value rule for the purpose of producing an equitable result, but it may not formulate a rule that would destroy the market value as just compensation. This principle is given effect in the *New York* case, *infra*, page 30, wherein the United States government in acquiring additional land for the Brooklyn Navy Yard, acquired three (3) streets and the Washington Avenue Bridge; the Court there allowed the payment award of \$5,303.00 for the Washington Avenue Bridge being the salvage value thereof. See also case note in *Columbia Law Review*, Vol. 48—1948, pages 1096-1098.

The next reported case *Woodville, Oklahoma v. U.S.* 1946, C.C.A. 10, 152 F.2d 735, uses the following language at page 737:

“It is *well settled* that the compensation to which the City is entitled when its streets are condemned is the cost of providing necessary substitutes therefor.” (Italics our own.)

citing the *Jefferson County* and the *Des Moines* cases.

In the next reported case *United States v. Los Angeles*, 1947, C.C.A. 9, 163 F.2d 124, the United States took a portion of Anaheim road for a navy defense plant. The county of Los Angeles had an easement for road purposes and was awarded the sum of \$16,282.00 being the market value of such easement. Quoting from the pertinent portion of the decision at page 125:

“the \$16,282.00 awarded to the county was awarded as being the market value of the county’s easement. That easement had, and could have had, no market value. Instead of awarding the *supposed* market value thereof to the county, the Court should have ascertained, and should have awarded to the county, the cost of providing a substitute road to replace that part of the Anaheim road \* \* \*.” (Italics our own.)

The next reported case on the question is the *Arkansas* case, *United States v. Arkansas*, 1947, C.C.A. 8, 164 F.2d 943, wherein the United States took land and bridge for Norfolk River Dam and Reservoir. The state was awarded \$1,342,000.00 cost of the substitute roads plus \$80,000 for the cost of a ferry. In its opinion the Court refers to the measure of damages as being (well settled) and the award of \$80,000 for the ferry was held to have been proper.

The next case was *New York City* case, *United States v. New York City*, 1948, C.C.A. 2, 168 F.2d 387. The District Court case being reported in 71 F. Supp. 255. The opinion of the Court written by

Judge Clark stated that the "rule is quite definite \* \* \*" also "reference to recent cases demonstrates the quite universal acceptance" /of it/.

The final decision of this line of cases is from the Ninth Circuit, September 1, 1948, *State of California v. United States*, 169 F.2d 914, at pages 924, 925 and 926, the United States condemned streets, the fee of which was owned by the State of California. *Said streets were, however, 20 feet under water.* The opinion of the Court reads in part as follows at page 924:

"The doctrine applies with equal force whether the public entity owns the fee in the roadbed or merely holds title to an easement thereon as trustees for the benefit of the public. If as here, the governmental unit owns the fee simple, the existence of the easement reduces the value of the public street or road to a nominal sum."

In conclusion, we respectfully point out that Judge Sanborn's rule, if applied to cases where the City owns the fee, is obviously inapplicable where (1) the easement does not destroy the full economic utility of the fee or (2) where such easement or a substantial portion thereof may be terminated at will. Let us assume there are valuable mineral rights under the surface of the street. Would not the owner of the fee be entitled to adequate compensation therefor? Would not such mineral rights be subject to the "market value test"?

And further, assuming that such easement does destroy the entire economic value of the fee, does not

the fact that the easement itself can be terminated at will, restore the presumptive value in the fee and make the land thereby susceptible of being used for other public purposes?

As a final comment on the rule formulated by Judge Sanborn in the *Des Moines* case, it should be noted that the three year period covering its inception to it being "quite universally accepted," was a WAR/Post WAR period; an atmosphere surcharged with patriotic zeal, where no sacrifice was too great to make for the United States government in the prosecution of World War II and further, the specific line of cases had to do with the United States government in exercise of its war time powers.

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### III.

**THE CITY AND COUNTY COULD HAVE DELIVERED MERCHANT-  
ABLE TITLE TO A SUBSTANTIAL PORTION OF THE LAND  
TAKEN BY THE UNITED STATES, OR COULD HAVE APPRO-  
PRIATED IT TO OTHER PUBLIC PURPOSES.**

A. The ownership of the streets in the Pearl City peninsula was in the Territory of Hawaii. Section 6112, Revised Laws of Hawaii 1945, reads as follows:

"Sec. 6112. Owned by Government. The ownership of all public highways and the land, real estate and property of the same shall be in the government in fee simple."

See *Marie K. Humphreys v. Manuel Mello, et al.* May 29, 1909, 19 Haw. 468; to the effect that it is owned by The Territory in fee simple.



B. The stipulation of March 24, 1948 by and between the United States of America, Petitioner, the Territory of Hawaii and the City and County of Honolulu, Defendants, merged, for the purposes of being entitled to compensation in this proceeding, the interest of the Territory of Hawaii and the City and County of Honolulu in and to such Pearl City peninsula streets. (R. 60-62.)

C. Such streets or portions thereof, may, under territorial law, be abandoned and disposed of for a substantial consideration. Section 4539, Revised Laws of Hawaii 1945, reads as follows:

“Sec. 4539. Disposal of abandoned roads, etc. Whenever a public road, street, alley or walk, railroad or ditch right-of-way, or any portion thereof, shall at any time be vacated, closed, abandoned, or discontinued, the same shall be used for the purposes of the Territory; provided, that in case the same shall be in any way disposed of by the territory, it shall be first offered to the abutters for a reasonable length of time and at a reasonable price, and if they do not take the same, then it may be sold at public auction.”

D. The City and County of Honolulu through its Board of Supervisors is vested with the power and capacity to abandon such Pearl City peninsula streets. See Section 6521, Subsection (33) Revised Laws of Hawaii 1945.

## “POWERS AND DUTIES OF SUPERVISORS.

### Sec. 6521. General Powers.

Subsection 33. Sale of real property. To sell at public auction after notice of publication once a week for at least two weeks in any daily newspaper of general circulation in the city and county, any real property acquired by the city and county whenever the Board deems it advisable to abandon the use of such property for the purpose for which it was acquired; \* \* \*

E. Let us consider this anomalous situation: If, immediately prior to the taking by the United States government, the Board of Supervisors of the City and County had abandoned the medial 40 foot strips of land of said streets, leaving 20 foot lanes on either side with crossovers at the intersections, and appropriated the abandoned portions to park purposes, the United States government, in its condemnation, would have to pay full market value for the park land thus taken. Are we to conclude then, that effective protection by the Fifth Amendment is conditioned upon the Board of Supervisors taking such action? The law does not require the performance of a needless act and there was no occasion—nor was it necessary—after the taking by the United States, for the Board of Supervisors to adopt such a resolution of abandonment. No more so than it is necessary for the owner of a fee, subject to a revocable license, to terminate that license prior to being entitled to full compensation upon condemnation of his property. Is it not reasonable to suppose that a volitional

act will be performed where it is to the person's substantial advantage to do so and to the person's substantial disadvantage to refrain from so doing?

The evidence was clear and uncontradicted that upon the Board of Supervisors adopting such a resolution of abandonment, the Territory of Hawaii could deliver merchantable title to the land so abandoned. (R. 110.)

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#### IV.

**THE CITY AND COUNTY IS, UNDER THE FIFTH AMENDMENT, ENTITLED TO SUBSTANTIAL COMPENSATION FOR THAT LAND TO WHICH IT COULD HAVE DELIVERED MERCHANTABLE TITLE OR COULD HAVE APPROPRIATED TO OTHER PUBLIC PURPOSES.**

Since Argument I establishes the proposition that municipalities are entitled to the protection of the Fifth Amendment in the taking of their property by the United States, and Argument III establishes the fact that the United States took from the City and County a valuable economic asset, we believe the following excerpt from *Olson v. United States*, 292 U.S. 246, at pages 254 and 255 to be applicable:

“\* \* \* The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324, 37 L. Ed. 463, 467, 13 S.Ct. 622: ‘In any society the fullness and sufficiency of the securities which surround the individual in the use

and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. *Reagan v. Farmers' Loan & T. Co.* 154 U.S. 362, 399, 38 L. Ed. 1014, 1024, 14 S.Ct. 1047, 4 Inters. Com. Rep. 560.

That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 306, 67 L. Ed. 664, 669, 43 S.Ct. 354; *Jacobs v. United States*, 290 U.S. 13, 17, ante, 142, 54 S.Ct. 26; 2 *Lewis, Em. Dom.* 3d ed. Sec. 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits or be required to bear the burden, of the owner's bargain. *L. Vogelstein & Co. v. United States*, 262 U.S. 337, 340, 67 L. ed. 1012, 1014, 43 S.Ct. 564. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Fed-

eral constitutions. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 454, 57 L. ed. 1511, 1563, 33 S.Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18.

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

In principle, but to an appreciably lesser degree, the taking of the Pearl City Peninsula by the United States conforms to the principle of the *Brown* case, *Brown v. U.S.* 1923, U.S. Supreme Court, 263 U.S. 77, at page 83; 68 Law. Ed. 171, at page 180. In this case, an act of Congress provided for the purchase or condemnation of a new town site to replace three quarters of the existing town site taken for the Snake River reservoir at American Falls, Idaho.

The opinion by Mr. Chief Justice Taft reads in part as follows:

"The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted

to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town, or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole."

It is desired to invite the Court's attention to the fact that the taking by the United States government deprives the public of the right to use said streets. Owned as they now are by the United States government and appropriated by the Navy Department for a Pearl Harbor Defense perimeter, the public would have no more right to use those streets than it would the streets in the Pearl Harbor Navy Yard, where one cannot gain access without a special pass. In fact, that was the very purpose of the taking—to exclude the Public from the waters of Pearl Harbor—to create a security perimeter by such exclusion.

The United States government has already condemned the lands served by the Pearl City peninsula network of streets. Eventually, the entire commu-

nity whose land was thus taken, will have to relocate in other parts of Honolulu. Such relocation will place an additional burden upon the City and County of Honolulu. This liability may be considered speculative or indefinite, it cannot be proved up with any approach to definiteness in a court of law, but nevertheless it does exist in reality. It is however, just as certain as death or taxes. And just as certain, the City and County of Honolulu will have to spend a substantial sum of money to meet it.

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## V.

**THE CITY AND COUNTY, HAVING DEMANDED A JURY TRIAL (R. 42), AND NOT HAVING WAIVED SAID DEMAND, IS ENTITLED, UNDER THE SEVENTH AMENDMENT TO COMPENSATION AWARDED BY A JURY.**

In *Beatty v. United States*, C.C.A. 4, 1913, 203 F. 620 at page 626, the Court stated:

“The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common

law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury.”

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### CONCLUSION.

It is submitted that the errors of the Court below were prejudicial to the constitutional rights of the Appellant and that this Court should so hold and remand the case for trial.

Dated, Honolulu, Hawaii,  
February 1, 1950.

Respectfully submitted,  
THE CITY AND COUNTY OF HONOLULU,  
*Appellant,*  
By WILFORD D. GODBOLD,  
City and County Attorney of Honolulu,  
By FRANK A. MCKINLEY,  
Deputy City and County Attorney of Honolulu,  
*Attorneys for Appellant.*



No. 12376

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**In the United States Court of Appeals  
for the Ninth Circuit**

---

**CITY AND COUNTY OF HONOLULU, APPELLANT**

*v.*

**UNITED STATES OF AMERICA, APPELLEE**

---

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
DISTRICT OF HAWAII**

---

**BRIEF FOR THE UNITED STATES**

---

**A. DEVITT VANECH,**  
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**FILED**

MAR 16 1950

PAUL P. O'BRIEN



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 12376

CITY AND COUNTY OF HONOLULU, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
DISTRICT OF HAWAII*

---

**BRIEF FOR THE UNITED STATES**

---

**OPINION BELOW**

The district court did not write an opinion. Its remarks at the close of the trial appear at pages 112-114 of the record.

**JURISDICTION**

This is an appeal from an order entered July 20, 1949, fixing just compensation in a condemnation action (R. 64-66). Notice of appeal was filed September 14, 1949 (R. 69). The jurisdiction of the district court rested upon the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V. sec. 171a, as amended by the Act of December 20, 1944, 58 Stat. 827, 50 U.S.C. App. sec. 645. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

**QUESTIONS PRESENTED**

1. Whether the district court was correct in awarding only nominal damages for condemnation of the fee

title to the streets and highways of the City and County of Honolulu, when there was no necessity for relocating the streets and highways.

2. Whether the district court erred in determining such question without a jury.

#### STATEMENT

The order appealed from (R. 64-66) awards the Territory of Hawaii and the City and County of Honolulu nominal compensation for the streets and highways condemned by the United States.

On January 8, 1946, the United States instituted proceedings to condemn the fee simple title to 34.03 acres of land, more or less, constituting the streets, roads and highways (except Lehua Avenue) located at Pearl City Peninsula, Oahu, Territory of Hawaii, for use in connection with the Pearl Harbor Security Perimeter Acquisition (R. 2-8, 43-44). The petition was amended so as to insert a detailed description of the various streets and highways (R. 9-38). On March 31, 1947, a declaration of taking was filed and estimated just compensation of \$2.00 was deposited with the court (R. 45-57).

When Pearl City Peninsula was taken by the Government, these streets belonging to appellant were "dead-end streets" in the sense that they ran into the water, but they served as a means whereby people in Honolulu could get into Pearl City (R. 111). The Government did not take Lehua Avenue, the main highway running through the center of the peninsula, and it is still being used by the public (R. 4, 114). The fee title to all but one or two per cent of the streets condemned was in the Territory of Hawaii (R. 97, Revised Laws of Hawaii 1945, Sec. 6112).<sup>1</sup> The fee

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<sup>1</sup> On March 24, 1948, the Territory of Hawaii and the City and County of Honolulu stipulated that for the purposes of this pro-

to that one or two per cent was in the owners of the abutting land, subject to public easements of ingress and egress (R. 111-112).

On July 11, 1949, the case was heard by the court without a jury<sup>2</sup> (R. 72-115). Counsel for appellant conceded that there was no necessity to build substitute roads (R. 114). Appellant's only witness, the Executive Officer of the Public Lands Office, testified that the burden of maintaining the streets and the use thereof is vested in the City and County of Honolulu (R. 97). He further testified that a street may be abandoned by the Board of Supervisors if access is otherwise available. Describing the Board's procedure, he stated that the Board will do so if the abutting land owners are furnished with a substitute facility, and they are agreeable to the abandonment; but if no substitute facilities are being created, no new facilities are in mind, and the abutting owners have no access to their property and refuse to consent to have the street closed, the Board of Supervisors will not abandon it (R. 107-108). He further testified that at the time this property was condemned there had been no abandonment proceedings instituted or anticipated on these streets so far as he knew (R. 111).

Upon these facts the court, following the established rule, held that under the circumstances the appellant was entitled to only nominal compensation (R. 112-114). On July 20, 1949, an order fixing just com-

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ceeding, the City and County of Honolulu shall be deemed to be the owner of the fee and improvements of said streets and highways, and entitled to compensation for the taking thereof (R. 60-62). The United States joined in this stipulation for the sole purpose of recognizing the agreement (R. 61).

<sup>2</sup> Although appellant had filed a demand for a jury trial (R. 42), the court, with the acquiescence of appellant's counsel (R. 92), heard evidence relating to determination of the legal question involved, with the understanding that if appellant was entitled to substantial compensation, evidence as to the amount thereof would be taken later (R. 94).

pensation at One Dollar (\$1.00) was entered (R. 64-66), from which this appeal was taken (R. 69).

# ARGUMENT

## I

### **The City and County of Honolulu Was Entitled to Only Nominal Compensation for the Taking of Its Streets and Highways**

The Government agrees that streets and highways owned by local governments are "private property" within the meaning of the Fifth Amendment. By decisions of this Court, as well as other courts to which the question has been presented, it is now well settled that the correct measure of compensation for the taking of streets and highways is the cost of furnishing a substitute way if such relocation is necessary to serve persons outside the condemned area, and when, as here, there is no necessity for such relocation, only nominal compensation may be awarded. *State of California v. United States*, 169 F. 2d 914, 924 (C.A. 9, 1948); *United States v. Los Angeles County*, 163 F. 2d 124 (C.C.A. 9, 1947).<sup>3</sup>

It is clear that in the instant case, as admitted by counsel for appellant (R. 114), no relocation is necessary. It follows that the court below was clearly correct in its ruling that appellant was entitled to only nominal compensation. Pitching its argument principally against *United States v. Des Moines County*, 148 F. 2d 448 (C.C.A. 8, 1945), certiorari denied 326 U.S. 743, appellant argues at length that this line of decisions is wrong. We submit that the opinions of

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<sup>3</sup> *United States v. City of New York*, 168 F. 2d 387 (C.C.A. 2, 1948); *United States v. State of Arkansas*, 164 F. 2d 943 (C.C.A. 8, 1947); *Woodville v. United States*, 152 F. 2d 735 (C.C.A. 10, 1946), certiorari denied 328 U.S. 842 (1946); *United States v. Des Moines County*, 148 F. 2d 448 (C.C.A. 8, 1945), certiorari denied 326 U.S. 743; *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C.C.A. 4, 1945); *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (C.C.A. 6, 1945), certiorari denied 324 U.S. 871, rehearing denied 324 U.S. 891.



this Court and the other courts cited above demonstrate the soundness of the rule.<sup>4</sup> It arises from the fact that public streets exist for the purpose of giving access to abutting land and as a part of a street system to aid communication. The value of their construction attaches not to the streets themselves but to the land they make accessible. They have no market value. Neither the original cost nor the reproduction cost of the street, nor the square foot value of the land upon which they are located bears any relation to the amount of loss resulting from disruption of the communication which it provides. The readjustment of a street system may cost the city substantially more or substantially less than the square foot value of the land in the street taken. If more, the city would not be made whole by a payment based on the value of the land in the street; if less, it would receive an unwarranted windfall. It is this windfall for which appellant contends (Br. 29). Appellant's assertions relating to other publicly owned property (Br. 27-28) present no reason for awarding it the windfall it seeks upon the taking of its streets.

Appellant also argues that the settled rule does not apply here because appellant owned the fee title. But the essential nature of a street is the same whether the public owns the fee title or only an easement. Hence, this Court in *State of California v. United States*, 169 F. 2d 914 (C.A. 9, 1948), at page 924, stated:

The doctrine applies with equal force whether the public entity owns the fee in the roadbed or merely holds title to an easement thereon as trustee for the benefit of the public. If, as here, the govern-

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<sup>4</sup> As noted in *United States v. City of New York*, 168 F. 2d 387 (C.C.A. 2, 1948), the cases of *Town of Bedford v. United States*, 23 F. 2d 453 (C.C.A. 1, 1927), and *Town of Nahant v. United States*, 136 Fed. 273 (C.C.A. 1, 1905) (second hearing *United States v. Town of Nahant*, 153 Fed. 520 (C.C.A. 1, 1907)), relied upon by appellant (Br. 12-16), are in accord with the principle above stated.

mental unit owns the fee simple, the existence of the easement reduces the value of the public street or road to a nominal sum.

Similarly, in *United States v. City of New York*, 168 F. 2d 387 (C.C.A. 2, 1948), the "quite universally accepted rule" was applied to a case where the city owned the fee to land in the streets, and not merely an easement.<sup>5</sup> See also: *United States v. 0.886 of an Acre of Land*, 65 F. Supp. 827 (E.D.N.Y. 1946). The fact, emphasized by appellant (Br. 31), that the streets involved in the *State of California, supra*, case were twenty feet under water does not aid appellant, since, as is apparent from this Court's opinion, the same rule was applied to those streets as to the streets which actually have been opened. The correctness of this Court's holding that the same rule applies whether the governmental unit owns fee title or an easement is emphasized by the fact that appellant does not own one or two per cent of the streets in issue. Fee title to those portions is held by abutting property owners subject to the public easement. It seems obvious that the same measure of compensation should be applied to all the streets condemned in this proceeding, and that it does not, as appellant urges, vary depending upon who owns the technical legal title.

Appellant stresses the argument that the streets might have been abandoned for such use, and the land thereupon sold or used for other purposes. But that does not change the fact that at the time of taking the streets existed as such. Thus, a similar authority to abandon streets existed in both *State of California v. United States*, 169 F. 2d 914 (C.A. 9, 1948), and

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<sup>5</sup> Washington Avenue, there involved, ran through the Wallabout Market area, which was owned in fee by the City of New York. See *United States v. City of New York*, 165 F. 2d 526 (C.C.A. 2, 1948); *United States v. 25.4 Acres of Land*, 61 F. Supp. 251 (E.D.N.Y. 1945), 71 F. Supp. 255 (E.D.N.Y. 1947). See also R. 81-83.

*United States v. City of New York*, 168 F. 2d 387 (C.C.A. 2, 1948).<sup>6</sup> This, of course, does not mean that the Government is acquiring land without paying just compensation therefor. As long as the streets exist, their value is reflected in the abutting property to which they give access.<sup>7</sup> If the streets were abandoned, the land therein might have some salable value but at the same time the abutting property would be reduced in value because of the loss of access. *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786, 790 (C.C.A. 4, 1945). A similar contention was rejected long ago in *Chicago, Burlington &c. R'd. v. Chicago*, 166 U.S. 226, 250 (1896), where it was stated:

Suppose the city had many years ago acquired the land in question by purchase or condemnation for the purpose of extending and had extended a street over it, and that the railroad company had thereafter acquired by condemnation the right to lay its tracks across the street upon making just compensation to the city. In ascertaining, in such a case, the compensation due the city, would it not be assumed, the street having once been opened, that the convenience of the public would always require it to be kept open, and that, therefore, compensation was to be ascertained, not upon the basis of the value of the city's land, as land, when crossed by the railroad tracks, but upon the basis that the land would always be a part of a public street? Both branches of this question must be answered in the affirmative.

Moreover, as the district court indicated (R. 112-113), it would be completely speculative whether the

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<sup>6</sup> Sec. 837 Deering's Cal. Codes; Sec. 383-2.0 Administrative Code of City of New York, page 416.

<sup>7</sup> Appellant recognizes this fact by its argument that substantial expenditures were made on the streets on the "calculated expectation of obtaining a substantial yield in taxes from the property that is served by such streets." (Br. 27).

streets would be so abandoned. In this regard, appellant's argument is similar to that unsuccessfully urged in the *City of Baltimore* case, *supra*, where it was held (page 791) that the possible use for alleys if the Government's need ceased and the property were returned to private ownership "is too speculative to furnish a basis for substantial damages." The speculative nature of the present claim was recognized by appellant's own witness who testified that no abandonment proceedings were anticipated on these streets (R. 111), and that assuming it had the power, the Board of Supervisors would not abandon the streets if it deprived abutting property owners of access, and if they did not consent to the closing (R. 107-108).

We submit that, as in the other situations where no substitute facility was necessary, appellant has suffered no loss and is not entitled to more than nominal compensation.<sup>8</sup>

## II

### The Court Below Did Not Err in Dispensing With a Jury Trial

Appellant, relying entirely upon *Beatty v. United States*, 203 Fed. 620, 626 (C.C.A. 4, 1913) (Br. 39-40), asserts that under the Seventh Amendment it has a right to a jury trial. While we believe it is clear that the Seventh Amendment does not require a trial by jury in condemnation cases,<sup>9</sup> that question need not be decided here, since the Hawaiian condemnation statutes provide for jury trial on questions of fact in

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<sup>8</sup> The reference to possible mineral value (Br. 31) is plainly irrelevant, since there is no claim that valuable minerals underlie the streets here concerned (R. 86, 112-113).

<sup>9</sup> *Bauman v. Ross*, 167 U.S. 548, 593 (1897); *United States v. Jones*, 109 U.S. 513, 519 (1883); *United States v. 243.22 Acres of Land*, 129 F. 2d 678, 684 (C.C.A. 2, 1942), certiorari denied *sub nom. Lambert v. United States*, 317 U.S. 698; *United States v. Meyer*, 113 F. 2d 387, 393 (C.C.A. 7, 1940), certiorari denied 311 U.S. 706; *Welch v. T.V.A.*, 108 F. 2d 95, 98-99 (C.C.A. 6, 1939), certiorari denied 309 U.S. 688; *United States v. Kennesaw Moun-*

respect to the value of land taken. *United States v. Honolulu Plantation Co.*, 122 Fed. 581, 585-588 (C.C.A. 9, 1903). However, "there is no constitutional right to have twelve men sit idle and functionless in a jury-box." *United States v. 243.22 Acres of Land*, 129 F. 2d 678, 684 (C.C.A. 2, 1942), certiorari denied *sub nom. Lambert v. United States*, 317 U.S. 698. Since, as we have shown under point I, appellant as a matter of law is entitled to no more than nominal compensation, no question of right to a jury trial is presented. Indeed, appellant's counsel made no objection to the procedure employed by the trial court (R. 92).

#### CONCLUSION

For the foregoing reasons, it is submitted that the order of the district court should be affirmed.

Respectfully,

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*tain Battlefield Assn.*, 99 F. 2d 830, 834 (C.C.A. 5, 1938), certiorari denied 306 U.S. 646; *United States v. Hess*, 71 F. 2d 78, 80 (C.C.A. 8, 1934); *United States v. Honolulu Plantation Co.*, 122 Fed. 581, 585 (C.C.A. 9, 1903); see also Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 Harv. L. Rev. 29 (1927).



No. 12,376

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CITY AND COUNTY OF HONOLULU,  
*Appellant,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

APPELLANT'S REPLY BRIEF.

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WILFORD D. GODBOLD,

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*Attorneys for Appellant.*

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No. 12,376

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CITY AND COUNTY OF HONOLULU,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S REPLY BRIEF.**

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**ARGUMENT.**

**I.**

**THE CITY AND COUNTY OF HONOLULU IS ENTITLED TO SUBSTANTIAL DAMAGES FOR THE TAKING OF ITS STREETS AND HIGHWAYS.**

**A.**

Appellee, while conceding that streets are "private property" within the meaning of the 5th Amendment (Appellee's Br. 4), asserts, in effect, that it has the right, after deliberately selecting a peninsular perimeter whose taking requires the construction of no substitute streets, to condemn first the land area within the perimeter, then condemn the street area within the perimeter and pay therefor the sum of only

One Dollar (\$1.00), irrespective of the magnitude of the street area taken or the vastness of the sum of tax money reflected in the completed thoroughfares. That protection afforded by the 5th Amendment would be nullified if such overzealous practice, or possibly the word is chicanery, were not checked by the Judicial branch of the Government.

## B.

Appellee states in part “\* \* \* it is now well settled that the correct measure of compensation for the taking of streets and highways is the cost of furnishing a substitute way if such relocation is necessary, to serve persons outside the condemned area, and when, as here, there is no necessity for such relocation only nominal consideration may be awarded.” (Appellee’s Br. 4.) It is stated here, in effect, that the condition precedent to necessary relocation, is the breaking of the highway “circuit”; that such relocation is necessary for the reason that persons outside the condemned area must be given access to the highway “circuit”.

It is conceded in the instant case, no persons outside the condemned area need be given access to the highway “circuit” and such was stated to the trial judge (R-114). It is not conceded, however, that the remaining taxpayers in the City and County of Honolulu are not damaged by the taking of 34.03 acres of streets (approximately 25,000 lineal feet). In the words of Mr. Chief Justice Taft, *United States v. Brown*, 263 U.S. 77, at page 83,

“\* \* \* It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole.”

It would appear from the foregoing language that Mr. Chief Justice Taft geared his thinking into that basic principle in the law of Eminent Domain to the effect that where a portion of the whole is taken, the owner must be compensated for the part taken, together with severance damages to the remainder. A city's network of streets is a system; if a portion of that system is taken, the city is entitled to compensation for the value, if any, of the part taken, together with severance damages, if any, to the remainder.

There appears to have been no necessary relocation in the *Brown* case, in the sense that that phrase is interpreted by Appellee. But just as the Supreme Court concluded that the American Falls Taxpayers were injured by the taking of three-fourths of their streets, so it is reasonable to conclude that the taxpayers of the City and County of Honolulu are injured when 34.03 acres of their streets are taken. And over and above that consideration, the City and County of Honolulu owned [by stipulation] the fee

title to all but one or two per cent of the land taken, and, the record shows the City and County could have delivered merchantable title to a substantial portion of that area or could have appropriated it to other public purposes (R-110-111). See also Section 6101, Revised Laws of Hawaii 1945, which reads in part as follows:

“\* \* \* and to sell or lease such excess property with such restrictions as may be dictated by considerations of public policy in order to protect and preserve such improvement; provided, however, that when any such excess property shall be disposed of by any county it shall be first offered to the abutting owner or owners for a reasonable length of time and at a reasonable price and if such owner or owners fail to take the same then it may be sold at public auction.”

### C.

It is not the intention of the City and County, nor is it included within its theory of recovery, to deprive the abutting property owners of reasonable access to their property. Therefore, that portion of Appellee's argument addressed to the abandonment of the entire way (Appellee's Br. 6 and 7) is not responsive to the facts at hand (R-90 and Arguments III and IV Appellant's Brief. To the extent, however, that Appellee's argument includes the abandonment of a portion of the way we submit the following:

The attorneys for the United States proceed upon the assumption that narrowing a street, *ipso facto* diminishes the value of the property served by said street. That assumption is fallacious. It is no truer

than its converse; widening a street *ipso facto* enhances the value of the property served thereby. The *ipso facto* widening or narrowing of a street is not susceptible of a universal postulate in determining the value of land thereby served.

In an area zoned for residential purposes, as in instant case, minimum width streets are desirable because they encourage minimum traffic and at a minimum rate of speed. Widening such streets could diminish the value of land served thereby. Conversely, narrowing oversize [extra width] streets in a residential zone—let us say, by establishing a parkway strip down the middle—could enhance the value of land served thereby.

We submit, therefore, that the correct concept is as follows: whether the narrowing or widening of a street, diminishes or enhances the value of the property served thereby, depends upon the facts and circumstances of *each particular case*.

#### D.

But even assuming that narrowing the streets in question will diminish the value of the land served thereby, there is substantial authority for the proposition that the abutting owner does not have a vested right in the *status quo* of a public way; that alteration of public way does not constitute a taking of the abutting property within the meaning of the 5th and 14th Amendments until the abutting owner is deprived of reasonable access to his property. Quoting from *Federal Eminent Domain*, Lands Division, Department of Justice, at page 71:

"It is the general rule that an abutting owner has no such right in the maintenance of the status quo as to be entitled to compensation for the closing of a highway;<sup>100</sup> but the rule would be otherwise in most jurisdictions where such closing deprived the owner of all means of access to any highway,<sup>101</sup> sometimes even where the discontinued street, though laid out on maps, had never been opened.<sup>102</sup> Despite a conflict of authority as to whether an abutting owner has a compensable property right in maintenance of the same degree and means of access previously enjoyed,<sup>103</sup> the best considered cases seem to hold that he has not.<sup>104</sup>

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<sup>100</sup>*Fearing v. Irwin*, 55 N.Y. 486 (1874). See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, and cases cited in footnote 70 therein.

<sup>101</sup>See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, cases cited in footnote 68 therein; and cf. *Central Trust Co. v. Hennen*, 90 Fed. 593 (C.C.A. 6, 1898); *Reining v. New York, L. & W. R. Co.*, 128 N.Y. 157, 28 N.E. 640 (1891); *Ogden v. New York*, 141 App. Div. 578, 126 N.Y.S. 189 (1st Dep't 1910); and cases cited in *Nichols loc. cit. supra*, footnotes 65-67 and 74-76 therein. For contrary rule, see cases cited in footnote 69 therein.

<sup>102</sup>E.g., *In re White Plains Road*, 179 App. Div. 216, 166 N.Y.S. 435 (1st Dep't 1917).

<sup>103</sup>See I *Nichols, Eminent Domain* (2d ed. 1917), sec. 115, and cases cited in footnotes 71-73 therein.

<sup>104</sup>*Mead v. Portland*, 200 U.S. 148 (1906) (alterations in grade blocking one of several means of access to wharf); *Meyer v. Richmond*, 172 U.S. 82 (1898) (blocking street at a distance from plaintiff's property); *Smith v. Corporation of Washington*, 20 How. 135 (1857) (alterations in grade of street); *Lockwood v. Portland*, 288 Fed. 480 (C.C.A. 9, 1923) (discontinuance of street at distance from plaintiff's property); *Stanwood v. Malden*, 157 Mass. 17, 31 N.E. 702 (1892) (discontinuance of street on which part of plaintiff's land abutted where some means of access remained); *Smith v. Boston*, 7 Cush. 254 (Mass. 1851) (discontinuance of part of street other than that upon which plaintiff's land abutted); *R. & A. Realty Corp. v. Pennsylvania R. Co.*, \_\_\_\_\_ N.J. \_\_\_\_\_, 3 A. (2d) 293 (Sup. Ct. 1938). But cf. *Egerer v. New York, Central & H. R. Co.*, 130 N.Y. 108, 29 N.E. 95 (1891) (cutting off all means of access except on foot held compensable)."



Suppose the abutting property owners are afforded more than reasonable access? Suppose the lands in question, abut an oversize [extra wide] street? Would not the City and County have a right to shrink the width of the street to a point where the property owners are yet permitted reasonable access?

What is a street of reasonable width?

What constitutes reasonable access?

Are not these questions of fact to be determined by a jury or court, as the case may be, after considering the facts and circumstances of each and every particular case? These questions are no more complicated, nor the answers thereto any more speculative, than those questions determined in the *Wheeler Township* case (*U. S. v. Wheeler Township*, 66 F. (2d) 977 at 984).

Having then determined the minimum width beyond which the City could not shrink a given street, the excess of that taken, over that which is found to have been appropriated to a special use, is the arithmetical balance for which the condemnee is entitled to be paid just compensation; a principle, the embodiment of which found its expression in the award of \$5,303.00 to New York City as being the salvage value of the Washington Bridge which was part of the highway taken by the United States in the expansion of the Brooklyn Navy Yard (*U. S. v. New York, City of*, 168 F. (2d) 387). The United States Court of Appeals, 2 Cir., in that case, reaffirmed the measure of compensation as initially laid down in the

*Des Moines* case. If One Dollar (\$1.00) only should have paid for the highway, should \$5,303.00 have been paid for the Bridge which was part and parcel of highway?

In the event a private way of 80 feet width were condemned and that fee were subject to a perpetual easement of way in an abutting owner which easement was limited to 40 feet in width, would not the owner of the private way be entitled to compensation for the differential?

### E.

Appellee, in justifying the taking of 34.03 acres of streets for the sum of One Dollar (\$1.00) states that if the City and County were to get more than nominal consideration, it would receive an "unwarranted windfall" (Appellee's Br. 5). It might be mentioned in passing that the free and unencumbered title to 34.03 acres of improved streets for One Dollar (\$1.00) is no mean bargain, in any man's language or currency. Manifestly, if there is "unwarranted windfall" in the wood pile, the United States and not the City and County, is the recipient thereof.

### F.

Appellee states in substance, that since one or two per cent of the streets taken were privately owned subject to a public easement, that fact would preclude the City and County from being paid more than nominal consideration. "It seems obvious that the

same measure of compensation should be applied to all the streets condemned in this proceeding, and that it does not, as Appellant urges, vary depending upon who owns the technical legal title" (Appellee's Br. 6).

The point raised may be easily answered.

The reason that different measures of compensation should be applied, is that the City and County can deliver merchantable title, whereas the private owner can not. Quoting from pages 25 and 26 of Appellant's Opening Brief:

"This brings us to what we consider to be a crucial distinction between the taking from private owners and the taking from a state, county or municipality. It is beyond the power or capacity of a private owner who subjects his fee to an easement in the public for road purposes to disencumber that fee. Consequently, when such land is condemned from the private owner he is awarded only nominal damages upon the basic assumption that the easement running as it does for perpetuity, in the absence of any proof to the contrary, destroys the economic utility of the land and the land thereby has only a nominal value. Should, however, that fee, encumbered as it is with an easement in the public for road purposes be acquired by a state, county or municipality having the power and capacity to abandon or change the public purpose or the use, then, in the face of such power and capacity to disencumber, the easement is tantamount to a revocable license."

## II.

**THE COURT BELOW ERRED IN NOT ALLOWING THE DAMAGES  
TO BE ASSESSED BY A JURY.**

Appellant gave the Court and opposing counsel notice that it had not waived its right to a jury trial, for at the bottom of the very page in the Record cited by Appellee concerning the question of jury trial appears the following language:

“Well, if you want to become technical, we have a demand for a jury trial in here, and we have not been afforded an opportunity to pick a jury.”

The City and County does not contend it has the “constitutional right to have Twelve men sit idle and functionless in a jury box.” Under its theory of recovery, there was plenty of work for the jury, but that work was left undone at the instance of the Court below.

**CONCLUSION.**

It is submitted that the errors of the Court below were prejudicial to the constitutional rights of the Appellant and that this Court should so hold and remand the case for trial.

Dated, Honolulu, Hawaii,

April 7, 1950.

Respectfully submitted,

THE CITY AND COUNTY OF HONOLULU,

*Appellant,*

By WILFORD D. GODBOLD,

City and County Attorney of Honolulu,

By FRANK A. MCKINLEY,

Deputy City and County Attorney of Honolulu,

*Attorneys for Appellant.*

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No. 12,376

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CITY AND COUNTY OF HONOLULU,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

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**APPELLANT'S SUPPLEMENTAL BRIEF.**

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WILFORD D. GODBOLD,

City and County Attorney of Honolulu,

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FILED

OCT 11 1950

PAUL W. SPENGLER,  
CLERK





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No. 12,376

IN THE  
**United States Court of Appeals**  
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CITY AND COUNTY OF HONOLULU,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S SUPPLEMENTAL BRIEF.**

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Pursuant to Order of this Honorable Court entered in these proceedings on May 11, 1950, directing both Appellee and Appellant to submit supplemental briefs on the general question of jurisdiction of the subject matter and the specific question of whether eminent domain was the correct procedure employed for the acquisition of subject streets, Appellant submits the following:

**I.**

Up to the time of annexation, the Republic of Hawaii functioned as a duly constituted and sovereign government and as stated by Mr. Justice Brown in *Hawaii v. Mankichi*, 190 U.S. 197, at pp. 211 and 212 wherein a full recital of the events leading up to annexation is set forth,

“In fixing upon the proper construction to be given to this resolution, (Newlands Resolution *infra* p. —) it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. \* \* \*, when the Hawaiian flag was hauled down and the American flag hoisted in its place.”

## II.

The terms of the Republic of Hawaii's consent to annexation and the acceptance of that consent by the United States Congress by Joint Resolution wherein the cession of the Hawaiian Islands to the United States was accepted, ratified and confirmed, constituted a compact by and between two sovereigns.

Said consent by the Republic of Hawaii reads in part as follows:

“BE IT RESOLVED, by the Senate of the Republic of Hawaii:

That the Senate hereby ratifies and advises and consents to the ratification by the President of the treaty between the Republic of Hawaii and the United States of America on the subject of the annexation of the Hawaiian Islands to the United States of America concluded at Washington on the 16th day of June, A. D. 1897, which treaty is word for word as follows:

‘The Republic of Hawaii and the United States of America, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said Islands, and of the expressed desire of the government of the Republic of Hawaii that those Islands should be incorporated into the United States as an integral part thereof, and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.

\* \* \* \* \*

‘ARTICLE II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

‘The existing laws of the United States relative to public lands shall not apply to such lands

in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition. Provided: that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.' ”

(*Sen. Jrnl. Rep. of Ha. Ex. Sess. 1897*, p. 16.)

The Joint Resolution of Congress No. 55, dated July 7, 1898, accepting, ratifying and confirming the cession and annexation of the Hawaiian Islands, commonly known as the Newlands Resolution, reads in part as follows:

“Whereas the Government of the Republic of Hawaii, having in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That said *cession is accepted, ratified, and confirmed*, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. (*Italics ours*)

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition; *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

30 Stat. at L. 750

### III.

The United States Congress in establishing the Territory of Hawaii, created more than a mere department of government or district comparable to the District of Columbia; the United States Congress so organized the territorial government as to possess the powers of a sovereign government. (*David Kawa-*

*nanakoa et al. v. Aileen Albertina Polyblank*, 205 U.S. 349).

The government of the Territory of Hawaii was constituted in tripartite form with its capital at Honolulu, on the island of Oahu (48 U.S.C.A. 491-636) and the Organic Act provided among other things,

“Sec. 5. U.S. Constitution. That the constitution and except as otherwise provided, all laws of the United States, including laws carrying general appropriations which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States \* \* \*”

48 U.S.C.A. 495

#### IV.

As to the land that was owned by the Republic of Hawaii and ceded to the United States upon annexation, the United States, under the terms of the cession made by the Republic of Hawaii and the Newlands resolution accepting the cession:

(1) Reserved unto the United States the right for Federal departments to have free use of the ceded lands;

(2) Recognized the inhabitants of the Territory of Hawaii as being the substantial owners of the land so ceded; and

(3) Continued in effect the Hawaiian land laws in lieu of the public land laws of the United States.



Quoting again from the Joint Resolution to provide for annexing the Hawaiian Islands to the United States,

“The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition; Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.”

The United States Congress integrated this provision in the Organic Act for the Territory of Hawaii. Section 91 thereof provides:

“Sec. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the *President* or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to

its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required, for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature; Provided, That when any such public property so taken for the uses and purposes of the United States, if instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section.” (Italics ours.)

48 U.S.C.A. 511

By said Section 91, pursuant to the terms of the cession, the President of the United States may authorize federal use of the ceded lands. It was because the land in the *Chun Chin* case, *United States v. Chun Chin*, 150 F. 2d 1016 (1945), was ceded land, and subject to Section 91, that it was the judgment of this Honorable Court that such land

should not have been condemned. That such reserved right of federal use does not exist as to the land acquired since annexation and owned outright by the Territory and its political subdivisions appears from Points VI through VIII of this brief.

While the important question is the one just indicated, that is, the distinction between the ceded land and the land owned by the Territory and its political subdivisions, nevertheless, the extent of the Territory's powers over and rights in the ceded land has bearing on the question of its independent enjoyment of the land owned outright by the Territory and its political subdivisions, that is, land acquired since the date of the cession. Pursuant to the terms of the cession the Hawaiian Organic Act recognized the Territory of Hawaii as the substantial owner of the ceded land. The Territory was vested with wide powers, including the power of disposition of the ceded land under the Hawaiian land laws continued in effect by section 73(c) of the Hawaiian Organic Act (48 U.S.C. 664, reviewed in *Pratt v. Holloway*, 17 Haw. 539), and the expenditure of the proceeds pursuant to Section 73(e) of the Hawaiian Organic Act (48 U.S.C. 666). That the Territory remained the substantial owner of the ceded land was held by this Court in *United States v. Fullard-Leo*, 156 F. 2d 756, 759-760, affirmed on other grounds, 331 U.S. 256.

The rights of the Territory in the ceded lands are such that even when they are in federal use, pur-

suant to the reserved right to make such use of the ceded lands, any revenue derived from rents or the like "shall be covered into the treasury of the Territory of Hawaii" (Sec. 91, Organic Act, 48 U.S.C. 511). When federal use of a parcel of ceded land is terminated, the control of the land is returned to the Territory, pursuant to Section 91 above quoted.

## V.

Congress having vested in the territorial government the wide powers above set forth, a specific reservation of the right of federal use of Hawaii lands is a necessity. Otherwise such right of federal use does not exist. This was the ruling of the Attorney General of the United States in the case of Porto Rico. In 1901, the Navy Department requested the President by executive order, to set aside certain lands in Porto Rico for the use of the Navy Department as an advanced naval base. The United States Attorney General rendered an opinion on said question which opinion reads in part as follows:

"\* \* \* But I am unable to escape from the conclusion that when harbor margins are involved, the Government of the United States, by reason of these grants of Congress to the government of Porto Rico, is now in the same position with reference to the island government, as well as to private owners, as it would be in a similar case affecting a State of the United States. In such case the Constitution indicates the proper course to be taken, to which the practice of the Government has conformed,

by providing that Congress may 'exercise exclusive legislation \* \* \* over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings' (Art. I, sec. 8, cl. 17). It is not needful in this case to withhold the analogy because the word 'State' alone is used in this provision, for Congress appears clearly to have placed the Territory of Porto Rico on the same plane as a State, in this respect at least, by its surrender of a large share of public property and functions to the local control."

23 OPS Atty. Gen. 564, 566 construing the Porto Rico Act of April 12, 1900, 31 *Stat.* 77.

## VI.

That the Territory and its political subdivisions themselves may hold the title to land is recognized by the above quoted Section 91 of the Organic Act. This section provides a method whereby even the title of land ceded to the United States may be vested in the Territory or its political subdivisions. The patent purpose of such provision is to enable the Territory of Hawaii and its political subdivisions to proceed with public works and other governmental functions under a secure title which will not be subject to the possibility of the Federal Government taking over the property under the original reserved power of federal use. For this purpose Section 91 provides that the title to property required for public works of the Territory or other

public purposes may be transferred to the Territory by direction of the President. For an example of such a presidential proclamation we refer the Court to the proclamation of February 17, 1920, 41 Stat. 1786 (Part 2), printed in the Appendix of this brief.

## VII.

The fee of the streets in the subject case never was ceded to the United States, but was acquired by the Territory of Hawaii and the City and County of Honolulu by grant from the Oahu Railway and Land Company subsequent to date of cession (R. 97-102).

## VIII.

In keeping with its purpose and intent that the Territory of Hawaii and its political subdivisions could own land in their own title, and even obtain a retransfer of ceded titles which would place ceded land beyond the power of the President to authorize federal use thereof, the United States Congress has never authorized the President to take or allocate for federal use land owned by the Territory of Hawaii or its political subdivisions. As above noted, the public land laws of the United States do not apply.

By the Act of August 21, 1941 (55 Stat. 394; 48 U.S.C.A. 677) Congress inserted a provision in Section 73(q) of the Organic Act that the Governor of Hawaii could set land aside for federal use. This section, 73(q), is not restricted to ceded

land in that it embraces all public land owned by the Territory, and it is important to note that in amending this section, Congress gave sole power and authority to the Governor of the Territory of Hawaii; it gave no power to the President such as is given to the President in Section 91, supra, relating to ceded land. This means that a federal department, having need of land owned by the Territory, may apply only to a territorial officer, the Governor of Hawaii, for its use. If the Governor of Hawaii does authorize federal use of territorial land, under Section 73(q) of the Organic Act, above cited, the Governor likewise can withdraw the land from such use. Again there is a contrast with Section 91 above quoted (48 U.S.C. 511) which governs the ceded land; under Section 91 once land is taken for federal use it remains in such use until the President restores it.

As a result, a federal department has only the power of eminent domain by which to acquire the fee title of territorial land. Hence, it must be presumed that Congress intended that power of eminent domain be used.

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### CONCLUSION.

It is submitted, that for the foregoing reasons this Honorable Court does have jurisdiction of the subject matter herein and further, that proceedings in eminent domain were properly instituted for the

purpose of acquiring the fee and improvements of subject streets.

Dated, Honolulu, Hawaii,  
July 10, 1950.

Respectfully submitted,  
THE CITY AND COUNTY OF HONOLULU,  
*Appellant,*  
By WILFORD D. GODBOLD,  
City and County Attorney of Honolulu,  
By FRANK A. MCKINLEY,  
Deputy City and County Attorney of Honolulu,  
*Attorneys for Appellant.*

**(Appendix Follows.)**



## **Appendix.**



## Appendix

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41 U.S. Stats. p. 1786 (Pt. 2)

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By the President of the United States of America

### A PROCLAMATION

WHEREAS section ninety-one of the Act of Congress approved April thirtieth, nineteen hundred, entitled "An Act to provide a government for the Territory of Hawaii" (31 Stat., 141-159) as amended by Section seven of the Act approved May twenty-seventh, nineteen hundred and ten (36 Stat., 443, 447) authorizing the transfer of the title to certain public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight (30 Stat., 750), and in the possession and use of the Territory of Hawaii, to said Territory; and

WHEREAS it is necessary that the title to such public property be transferred to the Territory of Hawaii;

Now, therefore, I Woodrow Wilson, President of the United States of America, by virtue of the power vested in me by section seven of the Act of Congress approved May twenty-seventh, nineteen hundred and ten (36 Stat., 443, 447), do hereby transfer to the Territory of Hawaii the title to all such pub-

lic property so ceded by the Republic of Hawaii and in the possession and use of said Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes:

*Provided*, That this proclamation shall not affect the title to any such public property within the said Territory taken for the uses and purposes of the United States, unless such property has been or shall be restored to its previous status by direction of the President of the United States in accordance with said section seven of the Act approved May twenty-seventh, nineteen hundred and ten.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 17th day of February, in the year of our Lord one thousand nine hundred twenty and the Independence of the United States the one hundred and forty-fourth.

(Seal)

Woodrow Wilson

By the President:

Frank L. Polk

Acting Secretary of State











No. 12,376

United States Court of Appeals  
For the Ninth Circuit

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CITY AND COUNTY OF HONOLULU,  
*Appellant,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

PETITION FOR A REHEARING ON BEHALF OF APPELLANT,  
CITY AND COUNTY OF HONOLULU.

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FRANK A. MCKINLEY,  
Acting City and County Attorney of Honolulu,  
Honolulu 13, Hawaii,  
*Attorney for Appellant  
and Petitioner.*







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No. 12,376

IN THE  
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CITY AND COUNTY OF HONOLULU,	}
vs.	
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	<i>Appellant,</i>
	<i>Appellee.</i>

**PETITION FOR A REHEARING ON BEHALF OF APPELLANT,**  
**CITY AND COUNTY OF HONOLULU.**

---

*To the Honorable William Denman, Presiding Judge,  
and to the Honorable Associate Judges of the  
United States Court of Appeals for the Ninth  
Circuit:*

The appellant, City and County of Honolulu, feeling itself aggrieved by the opinion filed in this Court on April 13, 1951, comes now and respectfully petitions this Court for a rehearing. The premise of this petition is that the opinion, in effect, destroys that protection afforded by the Fifth Amendment of the United States Constitution relating to the taking of property without just compensation.

## I.

**THIS COURT RECOGNIZED THAT THE STREETS CONSTITUTE AN ASSET OF SUBSTANTIAL VALUE WHICH COULD HAVE BEEN LIQUIDATED PRIOR TO THE TAKING.**

The opinion, as we analyze it, recognizes the following stated propositions and concerning which the appellant is in thorough agreement:

1. The appellant, City and County of Honolulu, is entitled to the protection of the Fifth Amendment in the taking of its property by the United States Government.

2. Such property is considered to be "private property" for the purpose of being entitled to just compensation under the Fifth Amendment.

3. The stipulation by and between the Territory of Hawaii and the City and County of Honolulu on the one hand and the United States Government on the other, filed on March 24, 1948, merged, for the purpose of being entitled to compensation, the interest of the Territory of Hawaii and its political subdivision, the City and County of Honolulu.

4. The fee of the 34.03 acres of roads, streets, and highways, lying within the Pearl City Peninsula and taken by the Federal Government, was in the Territory of Hawaii.

5. Such fee was subject to an easement in the public for road purposes.

6. The Board of Supervisors of the City and County of Honolulu had the power to disencumber such fee by adopting a resolution of abandonment.



7. The Territory of Hawaii could thereupon deliver merchantable title to the fee so disencumbered.

The foregoing outline is summed up by the Court in that sentence of the opinion which reads:

“Being owned by the territory in fee simple,<sup>9</sup> they could have been sold by the Territory if they had been abandoned and had not been taken by appellee.<sup>10</sup>”<sup>11</sup>

## II.

### DISTINGUISHING THE CHICAGO, BURLINGTON AND QUINCY CASE.

The point of departure between the rationale of the opinion and the thinking of the appellant lies in the next two sentences which read:

“However, they were not abandoned, and nothing in the record shows or tends to show that they would have been abandoned if they had not been taken.”

“The probability of such abandonment, if any such probability existed, was too remote to be considered in determining the question of compensation.” Cf. *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U.S. 226, 250-251.)<sup>2</sup>

We respectfully submit that the principle of the *C. B. & Q.* case cited as authority for the last proposition is not applicable to the case at bar for the following stated reasons:

<sup>1</sup>*City and County of Honolulu v. U. S.*, No. 12,376, April 13, 1951, Opinion of U. S. Court of Appeals for the Ninth Circuit, page 3.

<sup>2</sup>*City and County of Honolulu v. U. S.* *ibid.*

In the *C. B. & Q.* case, the City of Chicago proposed to extend Rockwell Street across the right-of-way of the C. B. & Q. Railroad. It was contemplated that the parcel of land identified as lying within the intersection of Rockwell Street extension and the railroad right-of-way was to be used jointly for railway and street purposes. Thus, the City of Chicago sought to impose an easement for street purposes upon that parcel forming the intersection, but without impairment of the ability of the railroad to continue to function. The Illinois Supreme Court denied more than nominal compensation. It is desired to point out that the economic utility of the fee of such intersection had been appropriated by the railroad in serving its other property forming a continuous and uninterrupted railway right-of-way. Had the railway conveyed out the fee without reserving a railway right-of-way easement, the value of the remaining right-of-way property as a railroad would be destroyed. On the other hand, the purchaser of such fee, if encumbered by a railway easement, could never hope to obtain clear title without payment of an exorbitant sum to the railroad; a sum tremendously in excess of the market value of the parcel in question. Also, the imposition of the additional easement for street purposes onto the easement for railway purposes enabled the railroad to continue to function and diminish neither the value of its fee nor the value of its easement.

Let us take the principle of the *C. B. & Q.* case and apply it to one of the streets in the Pearl City Penin-

sula. Suppose the Navy Department acquired two parcels of land in the Pearl City Peninsula lying across the street from one another. Suppose also, that it was proposed that buildings be erected on each parcel and that the buildings were to be connected by basement, main floor and second floor runways; and further, that easements were sought to be acquired to carry out this plan and that such easements were to be superimposed on the easement for street purposes, so that that parcel identified as lying within the intersection of the street and the subterranean, surface and elevated runways, could function jointly as a street and a connecting way for the two buildings. Could it be expected that the Territory under such circumstances would be entitled to anything other than nominal compensation? Clear title to the intersection could not be delivered without destroying the function of the remainder of the street.

But now let us apply the principle of the streets in Pearl City Peninsula to the *C. B. & Q.* case. The streets in Pearl City area form a cul de sac network; such network would function to a street system as a spur line, to a railway system. Suppose the City of Chicago proposed to extend Rockwell Street for a distance of 25,000 feet over and upon the entire *spur* line of the railroad? Also, that the proceedings in eminent domain call for the acquisition of the fee and the extinguishment of all encumbrances. Can there be any doubt but that the railroad in such circumstances would be entitled to substantial compensation for the taking of its spur line property and the

extinguishment of its right to operate thereon? In the case at bar, the entire network of streets, excepting only Lehua Avenue, is acquired in fee, along with the total and complete extinguishment of easement for road purposes, and to that end, the Territory of Hawaii and its political subdivision, the City and County of Honolulu, were made parties defendant as being the owner of the fee and the holders of the easement.

The fact that both the fee was acquired and the easement extinguished was stressed in appellant's opening brief from page 38 which reads:

“It is desired to invite the Court's attention to the fact that the taking by the United States government deprives the public of the right to use said streets. Owned as they now are by the United States government and appropriated by the Navy Department for a Pearl Harbor Defense perimeter, the public would have no more right to use those streets than it would the streets in the Pearl Harbor Navy Yard, where one cannot gain access without a special pass. In fact, that was the very purpose of the taking—to exclude the Public from the waters of Pearl Harbor—to create a security perimeter by such exclusion.”

It is respectfully submitted that since the fee was held subject to being cleared by the single act of abandonment by the Board of Supervisors of the City and County of Honolulu, in adopting a resolution thereof, the value was in the fee at the time of the taking, irrespective of the proximate or remote in-

clination of the Board of Supervisors to liquidate such value. Need a railroad have a proximate inclination to liquidate its spur line as a condition precedent to creating value therein? Is not the correct view that the capacity of the owner to terminate the license at will and convey out, free and clear, establishes the owner as being entitled to the full value of the fee at the time of the taking? And this is so, irrespective of whether the fee is being put to a use or purpose, which, until extinguishment, destroys the market value.

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### III.

#### DISTINGUISHING THE CALIFORNIA CASE.

The second point of departure between the rationale of the opinion and the thinking of the appellant lies in the Court's reaffirmance of the rule that the cost of substitute roads, where necessary, is the exclusive measure of damages and this is so, irrespective of whether the taking, includes a fee which could have been abandoned and sold for a substantial consideration. Such paragraph is summed up by its concluding sentence which reads:

“Therefore, the Territory was not entitled to more than nominal compensation,<sup>13</sup> and this is true despite the fact that the condemned highways were owned by the Territory in fee simple<sup>14</sup>.”<sup>3</sup>

Aside from the *Benedict* case, which was discussed at length in the California opinion, there is only one case

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<sup>3</sup>*City and County of Honolulu v. U. S.*, *supra*, page 3.

on point concerning the taking of the fee—that is the case of *United States v. California* (*California v. United States*, 9 Cir., 169 F. (2d) 914) decided by this Court. The facts and the record of the *United States v. California* can easily be distinguished from the case at bar, so that we earnestly request the Court to reconsider its view.

As pointed out in the Opening Brief concerning the *State of California v. United States*, page 31:

“Said streets were, however, twenty feet under water.”

Moreover, in re-examining the California Decision it appears that the State of California neither showed nor offered to show that the fee of the streets, twenty feet under water, had more than nominal value. In such circumstance, in the absence of such proof or offer of proof, would not this Court be correct in concluding that the State of California was entitled to no more than nominal value for the taking of its fee?

In the case at bar, it has been continuously asserted by the appellant that the fee taken has more than nominal value. Moreover, this Court has recognized that the streets could have been abandoned and sold prior to taking.

## IV.

## SHOWING WIDE DEPARTURE IN PRESENT MEASURE OF COMPENSATION FROM THAT OF UNITED STATES v. BROWN.

Concerning the true measure of compensation applicable to the taking by the Federal government of a municipality's streets, we desire to point out that such measure of compensation has shaped-up in seven different phases:

- (a) “\* \* \* It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole.” *U. S. v. Brown*, 263 U.S. 77 at page 83; Appellant's Reply Brief, pages 2 and 3.
- (b) In the event that substitute roads are required to be constructed by the taking, the Federal government discharged its constitutional liability in constructing such substitute roads. *U. S. v. Wheeler Township*, 66 F. (2d) 977; *Jefferson County v. Tennessee Valley Authority*, 146 F. (2d) 564.
- (c) As between the construction cost of the road taken and the construction cost of the substitute, necessitated thereby, the construction cost of the substitute is the exclusive measure

of damages. *U. S. v. Los Angeles*, 163 F. (2d) 124; *U. S. v. Arkansas*, 164 F. (2d) 943.

- (d) In the event no substitute roads are required, then the municipality is entitled to no more than nominal compensation. *U. S. v. Des Moines*, 148 F. (2d) 448; *U. S. v. Baltimore*, 147 F. (2d) 786; *U. S. v. Woodville, Oklahoma*, 152 F. (2d) 735.
- (e) When no substitute roads are necessary, it follows that no compensation is allowed, but salvage value of a street facility will be allowed (\$5,303.00 salvage value for bridge). *U. S. v. City of New York*, 168 F. (2d) 387 at 389-390.
- (f) Such exclusive measure applies, even though the Federal government took the fee. *U. S. v. California*, 169 F. (2d) 914.
- (g) This is true even though the municipality, prior to taking, could have abandoned said fee and caused it to be conveyed out for a substantial consideration. *City and County of Honolulu v. U. S.*, No. 12,376, April 13, 1951, Opinion of CCA 9.

This Court's attention is invited to the fact that in only one case awarding only nominal compensation, does the opinion discuss *U. S. v. Brown*, supra, and that case was *Baltimore v. U. S.*, supra, involving the condemnation of an easement. After quoting *U. S. v. Brown* at length, the Court in the *Baltimore* case states at page 791,

“In the pending case the City had made no improvements whatsoever to the alleys when they



were taken by the United States, but had merely accepted the dedication without any expenditure on its part. The alleys are now closed and there is no need either to reopen them or relocate them elsewhere. When taken they had no market value and their extinction imposed no obligation upon the City to replace them."

For a further discussion of the *Baltimore* case, reference is made to Appellant's Opening Brief, pages 21-25, 37-38 and Appellant's Reply Brief, pages 2, 3.

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## V.

### APPLICABILITY OF UNDERLYING PRINCIPLE OF UNITED STATES v. OLSON.

Since, for the purposes of being entitled to the protection of the Fifth Amendment, the taking from a municipality is the same as the taking from an individual, it is felt that the basic principle inhering in *United States v. Olson* (292 U.S. 246), applies in the instant case. If the City and County is entitled to the protection of the Fifth Amendment when the Federal government takes its property, then can the judiciary formulate an exclusive rule of compensation, the application of which will deprive the City and County from liquidating what substantial value it has in the fee taken? If the application of such an exclusive measure of damage is sound, then there is no reason for it not to apply to every service ramification of local government: parks, playgrounds, schools, libraries and all branches of government, including

their one-purpose structures, save only that of the tax collector's office.

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## VI.

### **PRESENT MEASURE OF COMPENSATION IS SUSCEPTIBLE OF UNSCRUPULOUS USE.**

The appellant's final comment on such measure of compensation as it has evolved within a period of a few years, is that it places a tool in the hands of the executive branch of the government which is susceptible of unscrupulous use. Quoting from pages 1 and 2 of the Reply Brief:

“Appellee, while conceding that streets are ‘private property’ within the meaning of the 5th Amendment (Appellee's Br. 4), asserts, in effect, that it has the right, after deliberately selecting a peninsular perimeter whose taking requires the construction of no substitute streets, to condemn first the land area within the perimeter, then condemn the street area within the perimeter and pay therefor the sum of only One Dollar (\$1.00), irrespective of the magnitude of the street area taken or the vastness of the sum of tax money reflected in the completed thoroughfares.”

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## VII.

### **CONCLUSION.**

The appellant, City and County of Honolulu, therefore respectfully submits to the Court that its former opinion in this case is in error in the particulars above

noted and in conflict with the basic principle of *United States v. Brown*, supra and *U. S. v. Olson*, supra, and that this Petition for Rehearing should be granted in order that the circumstances of this case and the conflict between the opinion in this case and the basic principles of *United States v. Brown*, supra, and *United States v. Olson*, supra, may be more fully presented to this Court.

Dated, Honolulu, Hawaii,  
May 11, 1951.

Respectfully submitted,  
CITY AND COUNTY OF HONOLULU,  
*Appellant and Petitioner*,  
By FRANK A. MCKINLEY,  
Acting City and County Attorney of Honolulu,  
*Attorney for Appellant  
and Petitioner.*



CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is not interposed for delay, and that in my judgment the same is well founded.

Dated, Honolulu, Hawaii,  
May 11, 1951.

FRANK A. MCKINLEY,  
Acting City and County Attorney of Honolulu,  
*Attorney for Appellant  
and Petitioner.*



















